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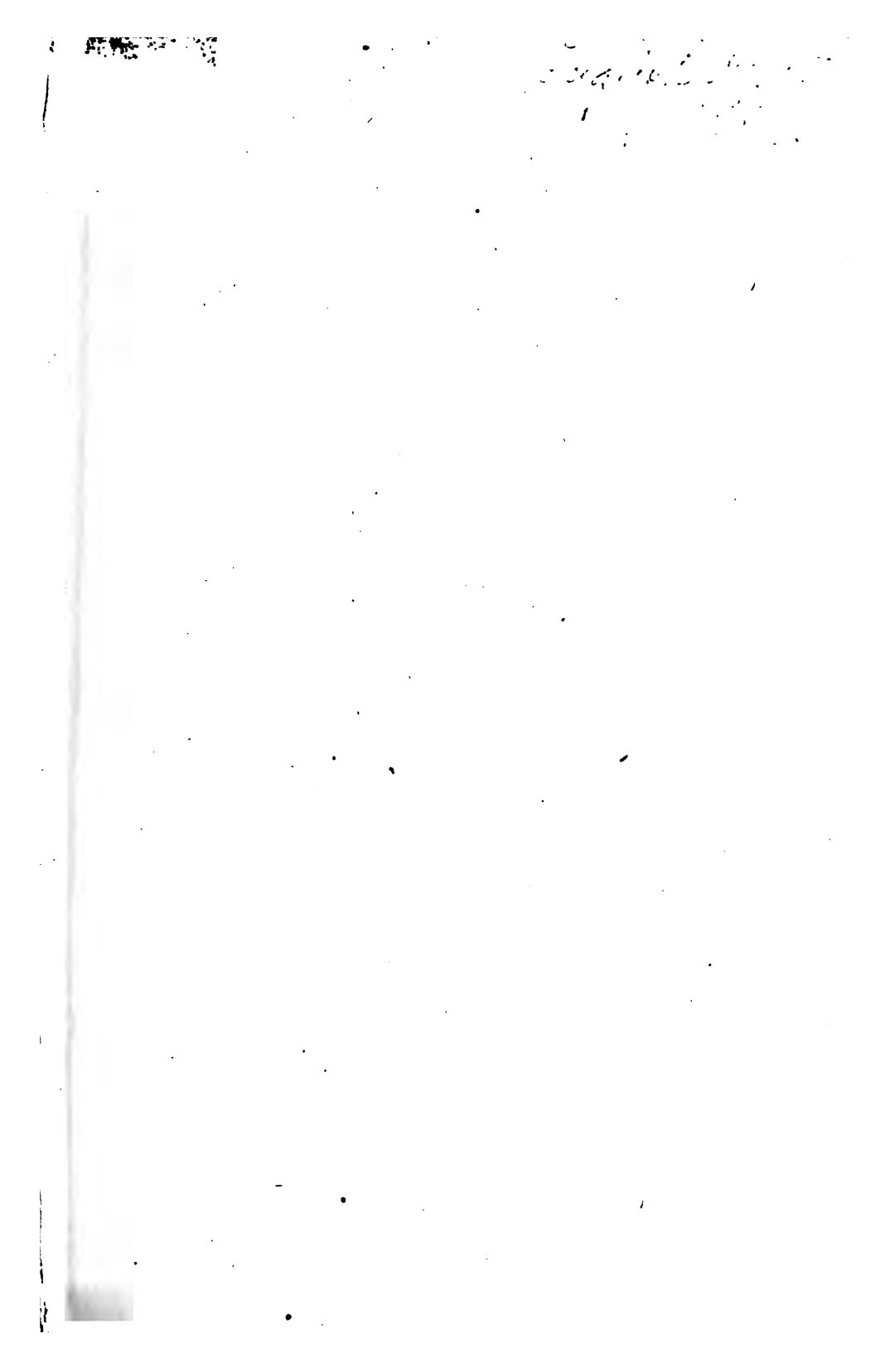
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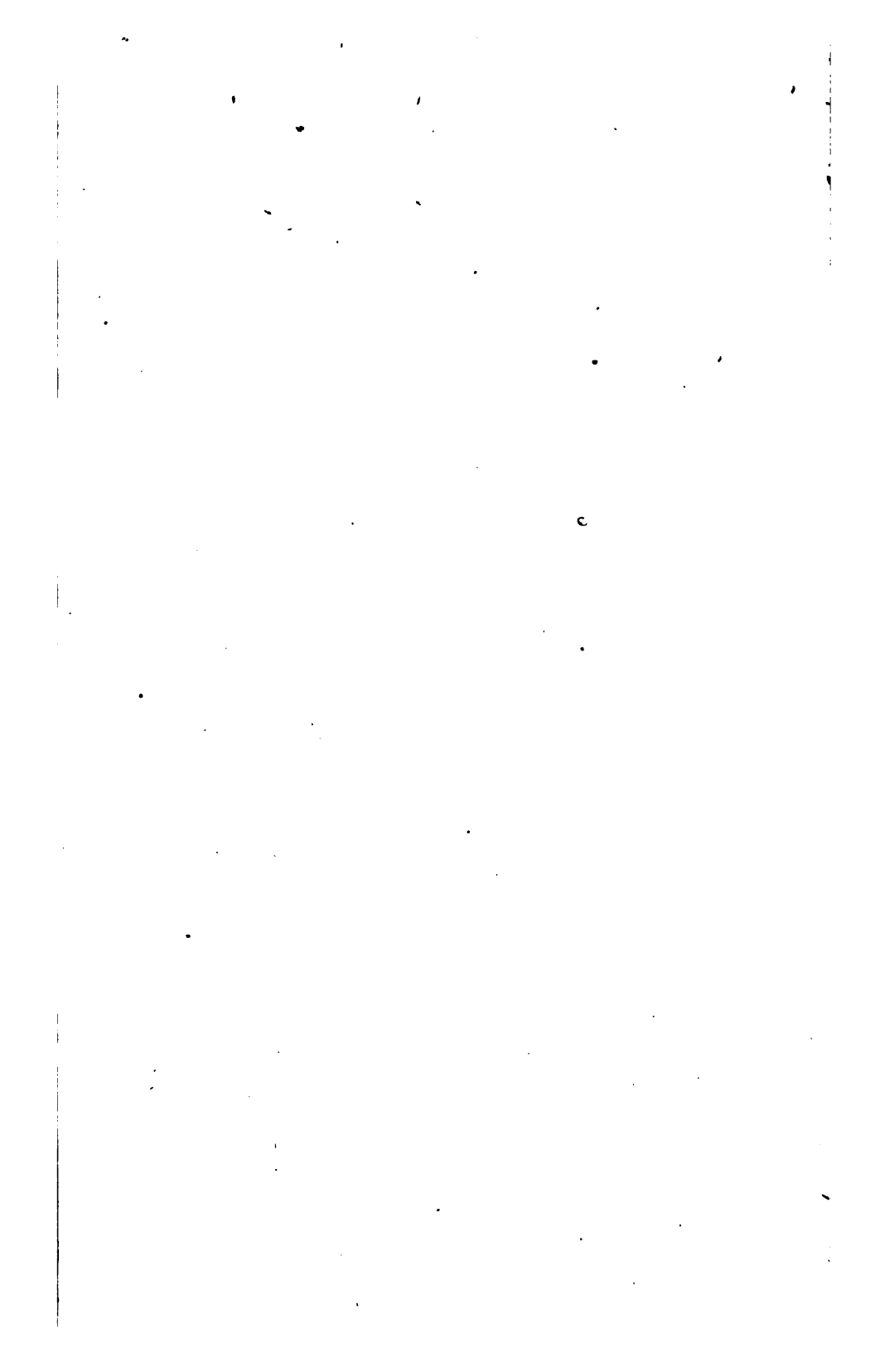
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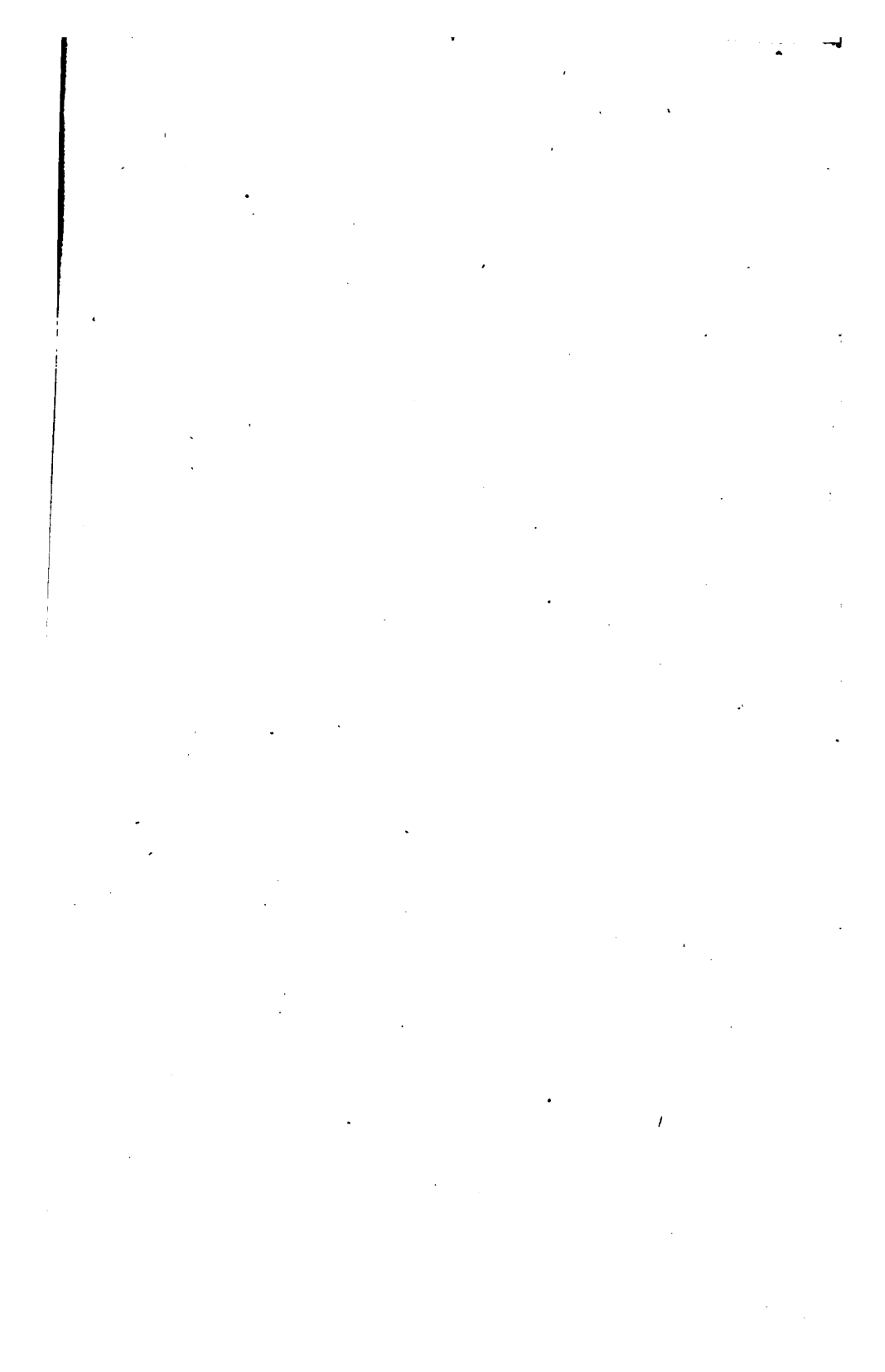
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No. XIII.

ART. I.—*A Practical Treatise on the Law, Privileges, Proceedings, and Usages of Parliament.* By THOMAS ERSKINE MAY, Esq.
Fourth Edition. London: Butterworths, 1859.

THE High Court of Parliament hath its own peculiar law—the *lex et consuetudo parliamenti*—as we are told by one of the highest authorities on English jurisprudence. The *lex et consuetudo* is part of the unwritten law of the land, to “be collected out of the Rolls of Parliament and other records, and by precedents and continued experience.” Now, a maxim of common law is proved by shewing “that it hath always been the custom to observe it,” and the decisions of courts of justice are “the evidence of what is common law.” Hence the constant declaration, by the High Court of Parliament, of a privilege belonging thereto, is evidence of its existence. Notwithstanding that such constitutional doctrines as the above occur in the early reading of the student of Blackstone, and are indeed very elementary in their nature; nevertheless, questions as to the privileges of Parliament have been the cause of much difficulty and dispute, nay, of no little danger, and they may yet, peradventure, be productive of

much more. The power of commitment being the natural and unquestioned support of parliamentary privilege, the aid and protection of an ordinary court of law are as naturally invoked by the person deprived of liberty at the hands of parliament; and thus collision between the august bodies is risked.

In the chapter on the Jurisdiction of Courts of Law in matters of privilege, at the close of his first book, Mr. May has some sensible remarks upon the unsatisfactory relations produced through the assertion of its privileges by parliament on the one hand, and the exercise of their jurisdiction by the ordinary courts of law on the other: —

“It is to be hoped,” says he, “that further contests may be very remote; but it must be acknowledged that the present position of privilege is, in the highest degree, unsatisfactory. Assertions of privilege are made in parliament and denied in the courts; the officers who execute the orders of parliament are liable to vexatious actions; and, if verdicts are obtained against them, the damages and costs are paid by the Treasury. The parties who bring such actions, instead of being prevented from proceeding with them by some legal process acknowledged by the courts, can only be coerced by an unpopular exercise of privilege, which does not stay the actions. If parliament were to act strictly upon its own declarations, it would be forced to commit, not only the parties, but their counsel and their attorneys, the judges, and the sheriffs; and so great would be the injustice of punishing the public officers of justice for administering the law according to their consciences and oaths, that parliament would shrink from so violent an exertion of privilege. And again the intermediate course adopted in the case of *Stockdale v. Hansard*, of coercing the sheriff for executing the judgment of the court, and allowing the judges who gave the obnoxious judgment to pass without censure, is inconsistent in principle, and betrays hesitation on the part of the House, distrust of its own authority, or fear of public opinion.

“A remedy has already been applied to actions connected with the printing of parliamentary papers; and a well-considered

statute founded upon the same principle, is the only mode by which collisions between parliament and the courts of law can be prevented for the future."

The author having here pointed out the anomalies and provocation to conflict, then proceeds to throw out a sensible suggestion to ensure the practical decision of questions of privilege when they arise between parliament and the courts of law. He proposes that there should be devised some proceeding analogous to an injunction or prohibition, to restrain parties from carrying on an action at common law, or taking other steps which are in derogation of the privileges of parliament, and that this prohibition should be made binding also on the courts.

The first question which arises is, what is the "privilege" in question? The dignity and independence of the two Houses are, "in great measure, preserved by keeping their privilege indefinite," says Blackstone (Com., vol. i. 164), and he assigns for a reason, that if all the privileges of parliament were once to be set down and ascertained, and no privilege to be allowed but what was so defined and determined, it were easy "for the executive power to devise some new case, not within the line of privilege, and, under pretence thereof, to harass any refractory member, and violate the freedom of parliament!" But this is not very satisfactory reasoning. For, whilst most of the collisions between the parliament and private persons have arisen from this indefiniteness admired by the commentator; so, also, the greater danger which has been threatened of late, is not through the powers of parliament being insufficient to protect its members from oppression by the Crown or molestation from other quarters, but rather that the privileges in question may be asserted and extended in violation of the freedom of the people, and the rights of private individuals.

Although, therefore, we cannot acquiesce in Blackstone's view of the great advantage derived from the uncertain character of privilege, yet, from its very nature and that of the body to which it is attached, there probably will be, at various times, as there have heretofore been, cases of doubt and dispute connected with

the operation of the *lex et consuetudo*, and this renders it essential that a means of settling them should be fixed.

There are two matters of *courtesy* rather than privilege, which, being undoubted and comprehensible, we may here refer to, before we investigate any question relating to privilege. The first is freedom of access to the sovereign. By this right individual members of the House of Commons may accompany the Speaker when he approaches the throne with an address; and, moreover, they may effect entrance to the presence of royalty in the ordinary costume of gentlemen, instead of that of their footmen. The second is, that their proceedings may receive "a favourable construction" from the Crown; a concession, we may add (without, we hope, incurring the penalties of contempt), of great value, considering the vast blunders fallen into, the amount of precious time wasted, and the party spirit exhibited on many occasions by the august legislative assembly.

Passing from these matters of courtesy to what is more properly the privileges of parliament, we find that some of the latter have been defined or confirmed by statute, whilst others rest solely upon law and custom. Thus the freedom of speech, which is an essential privilege, depending upon ancient custom (and one which, we may remark, especially in respect of the quantity, seems to be much prized by certain members of the Houses at the present time), was made a subject of legislation in Henry VIII.'s reign, on occasion of Richard Strode being prosecuted in the Stannary Court for his conduct in the House of Commons, with reference to bills relating to the tinnors of Cornwall. The 4 Henry VIII. c. 8, was passed, enacting that all suits, condemnations, &c. &c., "put or had" upon the said Richard, "and to every other of the person or persons that now be of the present parliament, or *that of any parliament thereafter*, shall be for any bill, speaking, reasoning, &c., of any matters concerning the parliament, utterly void, and of none effect."

In the interval between Strode's act and 1667, the privilege of free speech had nevertheless been often contracted or violated. At this latter period, therefore, the Commons took the oppor-

tunity to resolve, that "the act concerning Richard Strode is a general law, . . . and is a declaratory law of the ancient and necessary rights and privileges of parliament." Further, it was declared by the Bill of Rights (Art. 9), "that the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament." And again, at a still later date, a parliamentary privilege, or what was contended to be one, has been made the subject of statutory enactment by the 3 and 4 Vict., c. 9. By this act persons publishing papers by order of either House of Parliament, and those printing copies of such papers, are protected from all proceedings, civil and criminal, in respect of the contents of such papers.

Where statutory enactment does not define privilege, perhaps the best mode of arriving at its definition is by considering the instances where it has been declared that breaches have been committed. Thus direct disobedience to the orders or rules of the House is a breach of privilege, and has often been construed as a contempt, as have insults to the legislative body, and interference with its constitutional functions.

The publication of the debates of either House is also another breach of privilege. The Lords have a standing order to the effect, that it is a breach of the privilege for any person "to print, or publish in print, any thing relating to the proceedings of the House without the leave of the House." And until a century ago the journals of the Commons afford repeated instances of a like jealousy felt by their House to the public learning aught of their proceedings and debates. This is not one of the present dangerous privileges; for these orders are now, of course, only used formally, for the purpose of preventing misrepresentation of the debates. Any county member nowadays, however great a stickler for parliamentary dignity he may be, who is not reported in all his weary prolixity, and has not his stale and tautologous verbiage turned for him into a grammatical address, considers himself aggrieved. It is indeed hardly possible to conceive that this order, in its original and true meaning, would ever be attempted

to be enforced again ; but if it were, a question might possibly arise as to whether, under the altered circumstances of the country, the privilege is not abrogated, and whether it is within the present power of parliament to hold its debates in secret—whether, in point of fact, the reporters' gallery has not grown to be a substantive part of the representative institutions. The fact of the privilege becoming obsolete (arising from the change of habit and thought), has, we may remark, produced a curious anomaly ; for, whilst an honourable member may still speak any amount of slander in debate and be irresponsible, the unfortunate newspaper proprietor who permitted such speech to be reported is liable for libel.

Again, libellous reflections on the character or proceedings of parliament are breaches of privilege, which, on divers occasions, have been punished by reprimand, fine, imprisonment, pillory, or prosecutions at the hands of the Attorney-General. Recent instances of this breach are those of Sir F. Burdett, who published (in 1810) “a libellous and scandalous paper, reflecting upon the just rights and privileges of the House.” He was thereupon sent to the Tower. The case of *Burdett v. Abbott* (14 East. 1), to which we shall hereafter recur, arose out of this imprisonment. Nine years later Mr. Hobhouse was committed to Newgate for a “scandalous libel,” tending to “inflame the people” and excite them to violence against the House. In 1838, Mr. O’Connell charged upon certain members of the House, in the exercise of their duties on election committees, foul perjury. He avowed and repeated in his place this charge ; but this offence was so venial that the honour of the House was sufficiently vindicated by the Speaker reprimanding him ! So, too, those guilty of libelling individual members, as by affirming they were bribed, or by being otherwise guilty of gross misconduct, have been subject to the just penalties of the House.

Interference by menace, molestation, or otherwise, and reflections upon individual members, are also breaches of privilege. Thus, in modern times (1834), the editor of the *Morning Post* having indecently criticised Lord Brougham’s judicial conduct

in the House of Lords, was committed to the custody of the Usher of the Black Rod.

Another class of breach of privilege is the offering of bribes to, and their acceptance by, members. The last instance, we believe, of a *proved* case of this corruption occurred in 1695. However, in 1858 circumstances occurred which we need not here further allude to, but which occasioned the House of Commons to resolve—

“That it is contrary to the usage and derogatory to the dignity of the House, that any members should bring forward, promote, or advocate in this House any proceeding or measure in which he may have acted, or been concerned for, or in consideration of, any pecuniary fee or reward.”

There are other breaches of privilege which may be found printed in the journals of the Houses; but the enumeration above suffices to remind us of the general nature of privilege, and the importance of its being duly understood and temperately exercised. We agree with Mr. May, that now, whilst there is no legal contention or exciting cause of wrath between the powers, is the best time to settle the limits of the right of the legislative assembly. We believe further, that neither this nor any future period is likely to be one well suited for parliament to claim or exercise any prerogative or privilege which might be considered strained or exorbitant. Parliament, we also believe, would not lose in dignity by condescending to explain and agree on a procedure which should protect itself, and not provoke interference with the rights of the public. The strong can afford to be just—and the potency of parliament is undoubted. Indeed, “it is a fundamental principle,” according to Delolme, “with the highest lawyers, that Parliament can do every thing but make a woman a man, and a man a woman,” which is a more concise description of its limits and powers than that which Coke presents in his Fourth Institute. Of this high court the latter authority observes, that it may be of a verity affirmed, “*si antiquitatem spectes est vetusissima; si dignitatem est honoratissima; si jurisdictionem est capacissima.*” Its power is so

transcendant and absolute that it cannot be confined, either for causes or persons, within any bounds. It can alter the succession to the crown, the religion of the country, the constitution itself.

In quoting the above passage, however, we would fain remember that the doctrines of Coke on this Institute have not been always received as unimpeachable; and though often cited by "high privilege" men for the sake of the author's name rather than his matter, the latter must, in the case of this part of his works, be sceptically scrutinized. Thus, during the argument in *Burdett v. Abbott* (4 Taunt, 416), it was said that Prynne and Selden had proved that the *modus tenendi parliamentum in Anglia*, on which most of the Fourth Institute is founded, is a forgery, and that, therefore, most of that treatise must be considered of little or no authority. What Mr. Prynne, indeed, has done, in his treatise upon the subject of this Institute, is to enumerate many misquotations and inaccuracies which he had laboriously sought; and he boldly charges upon its author, in consequence, untrustworthiness generally, in this portion of his famous writing. "I shall seriously advise," says Prynne, "all professors, students of the common law, especially judges, and all members of Parliament, who shall have occasion to vouch any records quoted in the Institutes in their arguments or debates, diligently to search for, and compare them with, their originals, before they make public use of, or depend upon them (who, upon that account, should be very willing his misquotations or mistakes should be rectified), lest they be seduced or misguided by them to their dishonour, as many have been, and to follow the author's advice, *not to take any thing upon trust, but to search the fountains themselves, which I fear himself did not constantly pursue.*" And Sir O. Bridgman (in *Benyon v. Evelyn*) says that Lord Coke's treatise on the jurisdiction of parliament is a posthumous work, and contains a multitude of errors. But whether or no the doctrines of Coke, his arguments and authorities, be as unsound as is here represented, it remains still true of the dominion of parliament, that it is collectively, as well as in its separate portions, strong

enough to assert what its dignity requires and public utility demands, and also to waive what may tend to work much mischief to the community—the claim to doubtful or detrimental privileges.

Before we can judge in all respects of the cure for the mischievous relations which at present subsist between courts of law in respect of their jurisdiction, and the House of Commons with regard to its privileges, it will be well to recall some of the more modern cases when the conflict has arisen. We need go back no farther than the celebrated case of *Ashby v. White*, which was litigated in the second year of Queen Anne, and was selected by Mr. Smith as one of his leading cases, to exemplify the maxim of "*ubi jus ibi remedium*." The disputes arising out of this case ultimately took the form of a controversy between the House of Lords and Commons, which was only determined by the prorogation of parliament. The privilege which, the Commons contended, had been invaded in *Ashby v. White*, was that of their own exclusive right to entertain questions relating to the elective franchise. The House of Lords held that electors had a right to bring actions against returning officers touching their right of voting; whereupon the House of Commons resolved, "that any one who should dare to bring such action in respect of such causes, and all attorneys, solicitors, counsellors, and sergeants-at-law, soliciting, prosecuting, or pleading on" such cause, should be guilty of a high breach of the privileges of the House. Nevertheless, "the Aylesbury men," five in number, disregarding this resolution, brought their suit against the constables of this borough for rejecting their votes; and the House of Commons, obtaining copies of the declarations, carried out their expressed intention, and committed the Aylesbury men with their attorney to Newgate, and their counsel to the custody of the serjeant-at-arms.

One of the Aylesbury men (Paty) sued out a *habeas corpus* to the keeper of Newgate, who, for his return, set forth the speaker's warrant of commitment; and the Lord Chief-Justice Holt, as is well known, distinguished himself by holding, against the rest of

the court, that the prisoner should be discharged ; but, being overruled, writs of error were applied for. The Commons thereupon ordered their serjeant-at-arms to take into custody Montagu, Letchmere, Denton, and Page, the counsel for the prisoner on the *habeas corpus*. Nicholas Letchmere, however—he who afterwards was attorney-general—evaded the officer, who reported him to have escaped out of a back window of his chambers in the Temple, which were on the second floor (but which we grieve to say we cannot now identify), using for this purpose *his sheets and a rope*. The other learned gentlemen were either too dignified to escape, or lived on higher floors, so they were taken into custody. Thereupon they, in their turn, sued out writs of *habeas corpus*, and the complications were becoming still more serious—the conferences between the two Houses leading to no good result—when the Queen settled the matter, for the time, by proroguing parliament. What were the views of the Lords on this constitutional question, will be seen in the report of the committee which they appointed to examine the proceedings in *Ashby v. White*. This report embodies the arguments of the Lord Chief-Justice, and it is said was mainly drawn up by him.

There was no little conflict of opinion on the Bench in the celebrated case to which we are now alluding ; and if we may trust to the version of the proceedings in court, given by Lord Raymond, the judges allowed themselves greater freedom in expression, pointed language, and personal allusions, than are nowadays observed. A hundred years ago, when a member of the courts, especially if he were the chief, thought the views or arguments of his brethren on the Bench erroneous, he seems to have said so in a hard, blunt, and peremptory fashion, examples of which will be seen in the following extracts. Thus, Powys, J., stated his opinion as to parliamentary privilege (which he did briefly and pertinently) as follows :—“ Another reason against the action is, that the determination of the matter is particularly reserved to the parliament, as a matter conusable by them, and to them it belongs to determine the fundamental rights of their House, and of the constituent parts of it, the members ; and

the courts of Westminster shall not tell them who shall sit there. Besides, we are not acquainted with the learning of elections, and there is a particular *cunning* in it not known to us, nor do we go by the same rules, as they often determine contrary to our opinion without doors." In another and less laudable tone he adds, "Our business is to determine of *meum* and *tuum* where the heats do not run so high as on things belonging to the legislature; therefore, this being an unprecedented case, I shall conclude with a saying of my Lord Coke, '*Omnis innovatio plus novitate perturbat quam utilitate prodest.*'" He also said, that the defendant was "*quasi* a judge;" whereupon Powell, J., took up his words sharply, saying, "I do not understand what my brother Powys means by saying he is '*quasi* a judge;' *surely he must be a judge or no judge.*"

Holt, C. J., in his admirable and well-known judgment, remarked in the outset—"My brothers differ from me in opinion, and they all differ from one another *in the reasons of their opinion*;¹ but, notwithstanding their opinion, I think the plaintiff ought to recover. I will consider their reasons. My brother Gould thinks no action will lie against the defendant, because, as he says, he is a judge; my brother Powys, indeed, says he is no judge, but *quasi* a judge; but my brother Powell is of opinion that the defendant neither is a judge nor any thing like a judge, and that is true." Then, turning to the point of privilege, the Chief-Justice continuing in a bantering tone, "But my brother says we cannot judge of this matter, because it is a parliamentary thing. Oh! by all means be very tender of that! Besides, it is intricate, and there may be contrariety of opinion." . . . "But they say, that this is a matter out of our jurisdiction, and we ought not to enlarge it. I agree we ought not to encroach or enlarge our jurisdiction; by so doing we usurp both on the right of the queen and the people; but sure we may determine

¹ This reminds one of the well-known judgment of Maule, J., when a difference of opinion existed among the members of the Bench—"I agree," said this caustic judge, "with the conclusions of my brother A, for the reasons offered by my brothers B. and C."

on a charter granted by the king, or on a matter of custom or prescription, when it comes before us, without encroaching on the parliament. And, if it be a matter within our jurisdiction, we are bound by our oaths to judge of it. This is a matter of property determinable before us. Was ever such a petition heard of in parliament, as that a man was hindered of giving his vote, and praying them to give him remedy? The parliament undoubtedly would say, Take your remedy at law. It is not like the case of determining the right of election between the candidates.

"My brother Powell says, that the plaintiff's right of voting ought first to have been determined in parliament, and to that purpose cites the opinion of my Lord Hobart (318), that the patron may bring his action upon the case against the ordinary, after judgment for him in a *quare impedit*, but not before. *It is indeed a fine opinion, but I do not know whether it will bear debating*, and how it will prove when it comes to be handled. For, at common law, the patron had no remedy for damages against the disturber, but the statute 13 Ed. I., st. 1, c. 5, s. 3, gives him damages; but if he will not make the bishop a party to the suit, he has lost his remedy which the statute gives him. But, in our case, the plaintiff has no opportunity to have remedy elsewhere. My brother Powys has cited the opinion of Littleton on the statute of Merton, that no action lay upon the words, '*si parentes conquerantur*,' because none had ever been brought, yet he cannot depend upon it: Indeed, that is an argument when it is founded upon reason, *but it is none when it is against reason*." A little further on he declares, that "We must not be frightened when a matter of property comes before us, by saying it belongs to the parliament; we must exert the Queen's jurisdiction. *My opinion is founded on the law of England*."

Chief-Justice Holt certainly was not a man easily "frighted." His language and demeanour savour of courage as well as honesty. He took occasion, during the argument, to exclaim, "Let all people come in and vote fairly. It is to support one or the other party to deny any man's vote. By my consent, if such

an action were to be tried before me, I would direct the jury to make him pay well for it; it is denying him his English right!"

It must be remembered that the disputes on privilege between the courts of law and the House of Commons was at this time strongly coloured by the mutual enmity which existed between political parties. The House of Commons was at this time vehemently Tory. Sir John Holt was a zealous Whig as well as an independent judge. In the sketch of the life of this eminent judge by Lord Campbell, the biographer refers to a fictitious but well-invented anecdote, which, he observes, obtained great currency. This obviously arose from its being characteristic of the parties concerned, and it was probably received with all the less question as it represents the popular side of the question in a triumphant attitude. For this reason, as well as because it shows how authenticity is a quality disregarded in personal tales of this kind, it is worth repeating. "The sergeant-at-arms of the Commons," says the veracious story-teller, "presented himself before Chief-Justice Holt, sitting on his tribunal, and summoned him to appear at the bar of the House, to purge himself of his share of the contempt. That resolute defender of the laws said, with a voice of authority, 'Begone!' Soon after comes the Speaker in his robes and full-bottom wig, attended by many high-privilege members, and said, 'Sir John Holt, Knight, Chief-Justice of her Majesty's Court of Queen's Bench, in the name of the Commons of England, and by their authority, I summon you forthwith to appear at the bar of the House, to answer the charge there to be brought against you for divers contempts by you committed, in derogation of their ancient and undoubted privilege.' 'Go back to your chair, Mr. Speaker,' *calmly* replied his lordship, 'within these five minutes, or you may depend upon it I will lay you by the heels in Newgate. You speak of your authority, but I tell you that I sit here as an interpreter of the laws and a distributor of justice; and if the whole House of Commons were in your belly I would not stir one foot.' The Speaker quailed under the rebuke, adds the faithful chronicler, and quietly retired with his high-privilege

body-guard; and the Commons, terrified to contend longer with such an antagonist, let the matter drop." This last polish to the tale is enough to demonstrate its inaccuracy, for it was the prerogation of parliament which caused "the matter to drop."

The dispute, however, had the effect of producing for the Whig party great accession of numbers at the next election, and for Sir John Holt increased credit and reputation. The part which this learned judge took in the discussion, as well as that which fell to the lot of one of his successors—Lord Ellenborough—is described in Lord Campbell's "*Lives of the Chief-Justices.*" But the comments which the biographer makes on the general question are not, in our opinion, unimpeachable. Sir John Campbell was Attorney-General in 1839, and argued the case of *Stockdale v. Hansard* (9 Ad. & El. 1), on behalf of the defendants, advocating the right of privilege very elaborately, and as unsuccessfully. Lord Denman, on this occasion, it will be remembered, expressed no little indignation with certain of the arguments adduced on behalf of the House of Commons, and with their tone generally. A lingering admiration may be traced in the author, for the arguments offered and doctrines propounded by the Attorney-General of 1839; and some recollection of the determined judgment, and some displeasure at the uncompromising language, of Lord Denman, may be observed in more passages than one of Lord Campbell's popular volumes.

Lord Holt, let it be remembered, who was so jealous of privilege being abused, is the great authority for the general principle, that the House of Commons has power to commit for contempt; but if, as in the *Queen v. Paty*, the House stated in their warrant *that* to be a contempt which was no contempt, he held there was an excess of jurisdiction on their part, against which the courts of law would protect a subject applying to them. He was followed in this view in the judgment delivered in *Burdett v. Abbott* (16 East. 1). Lord Ellenborough in this case repeated it in the well-known distinction which he made between warrants of commitments by the House. If, said he, the commitment were for contempt of the House "*generally*, I

would, neither in the case of that court or any other of the superior courts, inquire further; but if it did not *profess* to commit for a *contempt*, but for some matter appearing in the action, which could by no reasonable intendment be considered as a contempt of the court committing, but a ground of commitment palpably and evidently arbitrary, unjust, and contrary to every principle of positive law and natural justice, . . . we must look at it and act upon it as justice may require, from whatever court it may profess to have proceeded." When the Speaker of the House of Commons, having pleaded, in the last-mentioned case, that Sir Francis Burdett had published, in *Cobbett's Weekly Register*, a libel on the privileges of the House, and that the latter body having so resolved, had ordered the defendant to issue his warrant to commit Sir Francis to the Tower, it was held a good plea.

Stockdale v. Hansard is the next case which may be here adverted to, the action being for defaming the plaintiff's character, in charging upon him the publication of obscene works. The "defamation" had been printed under the order of the House of Commons, which order was pleaded; and it was alleged that the right to make such an order was an essential incident to the due performance of parliamentary functions. This, said Lord Denman, amounts to "a claim for an arbitrary power to authorize the commission of any act whatever on behalf of a body which is admitted not to be the superior power in the state." He then proceeded to inquire whether "the House of Commons, by claiming any thing as its privilege, thereby makes it a matter of privilege;" and further, whether "its own decision upon its own claim is binding and conclusive." The Chief Justice put the question quite simply when he said—"The learned counsel for the defendant contends for his legal right to be protected against all consequences of acting under an order issued by the House of Commons, in conformity with what that House asserts to be its privilege, nor can I avoid then the question whether the defendant possesses that legal right or not." Elsewhere this

point is also succinctly put, as resolving itself into the question, "Can one branch of the legislature overrule the law?"

The report of the committee of the House of Commons appointed to examine into the subject under consideration, in the case of *Stockdale v. Hansard*, was cited in the argument, and contains the arguments adopted, and the views professed, by that House. The 3 & 4 Vict., c. 9, however, settles by statute the particular question then in debate.

The claim of the House of Commons to preclude the court from inquiring into the legality of an act by a resolution that it had the power to do the act complained of, is so clearly stated by Pattison, J. (9 Ad. & El., 192), that it is worthy of repetition. "If," says he, "the doctrine be true that the House, or rather the members constituting the House, are the sole judges of the existence and extent of their powers and privileges, I cannot see what check or impediment exists to their assuming any new powers and privileges which they may think fit to declare." Now surely this is so, and to stop the courts of law from determining the *lex et consuetudo parliamenti*, because the courts have no knowledge of the subject, is evidently inconsistent with the declaration that the said *lex et consuetudo* form part of the common law of the land.

The case of the Sheriff of Middlesex (11 Ad. and El., 273), arose out of the case of *Stockdale v. Hansard*. The return to the *habeas corpus*, sued out by the sheriff against the sergeant-at-arms, simply certified that the latter functionary detained the sheriff for "contempt" of the House. The facts which constituted the alleged contempt were not shown by the warrant cited in the return. All the authorities on the subject seem to show that such a return precludes a court of law from investigating the adequacy of the causes of commitment. Hence it is always within the power of the House of Commons to evade any questioning of its commitments, by means of its officer stating in general terms that a contempt has been committed. "It would be unseemly," as Lord Denman in the last-mentioned case significantly observed, "to suspect that a body acting under such sanctions as a House

of Parliament, would, in making its warrant, suppress facts which, if discussed, might entitle the person committed to his liberty. If they even did so act" (as, in point of fact, was just what they were doing, and every one knew it), "I am persuaded that, on further consideration, they would repudiate such a course of proceeding. What injustice might not have been committed by the ordinary court in past times if such a course had been recognized? As, for instance, if the recorder of London in *Bushell's case* had, on the warrant of commitment, suppressed the fact, that the jury-men were imprisoned for returning a verdict of acquittal, I am certain that such will never become the practice of any body amenable to public opinion."

The case of *Howard v. Gossett* (the fourth action between these parties), which came on for trial on the 15th November, 1844, arose from the sergeant-at-arms having taken the plaintiff into custody, under warrant of the House, for contempt. In the Queen's Bench judgment was given for the plaintiff. On the writ of error this judgment was reversed. Looking at the differences of opinion, and the language employed by the learned men who reviewed the subject, we cannot say that this case has left it in a satisfactory position. Thus Coleridge (J.), in his eloquent judgment (10 Ad. and El., 377), said:—"The defendant's first point states that he, being an officer of the House, is protected by an order of the House directing him to do to the plaintiff the identical act complained of; and such an order is of itself, and without more, an answer to the action! In the argument, this point (although stated to be unnecessary for the defendant) was insisted upon. No exception was admitted to its truth; no limit imposed upon the generality of the propositions. What the quality of the act commanded may be is not to be inquired into; it is enough that the House has ordered it, and, as the House is irresponsible, so must its office be. I do not wish to misrepresent the language used; but I think I am bound so to understand it as resting the defence of the officer not on the quality of the thing commanded, but on the unlimited extent of the authority from which the command proceeded. If this were not so, language

most alarming has been wantonly or carelessly used by those whom I, with reason, respect too much to believe them capable of acting in a wanton or careless spirit in any matter ; least of all, in such a matter as this. But, so understood, I venture to say that *the proposition is not only untenable, but monstrous*. Extreme as it is, it might not be unreasonably met by extreme suppositions. A proposition universally affirmative cannot be true, if the negative of it be true in any one particular ; and it is no answer that an abuse of such extreme powers in our representative body cannot be respectfully or even decently presumed. I presume nothing. We ought to have, I admit, the fullest confidence in the humanity, justice, honour, and integrity of the House. It is entitled to our most sincere veneration ; but we have a right to consider our liberties as independent of any such qualities in those who are in authority ; as resting on the law ; as things not precarious, but which we hold by right and charter. When Lord Camden delivered his memorable judgment on *Entick v. Carrington* (19 How. St. Tr., 1029-1066), he thought it a legitimate mode of proving the illegality of the warrant, to show the consequences of its being supposed to be legal on the security of the private papers and confidence of every Englishman ; how it placed at the discretion of the Crown the secret papers, the cabinets and bureaux, of every Englishman in the land, however innocent. If time allowed, and I was so disposed, how much more strong a picture, without the slightest exaggeration of a feature, might be drawn of the state in which we should live by law, as to security of property, liberty of person, safety of character, or life itself, if the solicitor-general's proposition was really sanctioned by that law ! But it is needless, and I gladly forbear. It is enough to say, *that the law is supreme over the House of Commons as over the Crown itself*. If the limits of the law be passed by either, for the most satisfactory reasons they are indeed themselves responsible ; but the law will require a strict account of the act in the persons of their agents ; and these, according to the nature of the illegality, will be answerable civilly or criminally."

Elsewhere when considering the proposition, whether the fact

of a warrant being issued by order of the House would have been an answer in law to an action for an arrest, the same judge remarked:—"In truth, common learning on the constitution, common justice and common sense, equally revolt against it. If such a limitation on the birthright of Englishmen existed—so important, so remarkable in its cause and consequences—it must have been stated, though it would have been recorded with regret, and, I think, something like shame, in some one of those many definitions of our most valuable right—the right of personal liberty—with which our text-writers abound."

In the Exchequer Chamber, Parke (B.) delivered judgment as well for himself as for his brethren—Alderson, Coltman, Maule, Rolfe, and Cresswell—and this judgment has left the questions of principle referred to in the court below, unconfirmed and unreversed. "We deem it right," says the learned judge, "to abstain from giving an opinion upon some of the questions as to the privileges of the House, which were discussed by the learned counsel, because our judgment in no way depends upon them. We need not, therefore, decide whether the House of Commons is the sole judge of its own privileges, not merely when it is adjudicating on their alleged violation, but in all cases; so that whatever it commands must be deemed to be in conformity to them, and the mere order of the House, under all circumstances, is a sufficient answer precluding all inquiry into its legality by any ordinary court."

The reversal of the judgment below, therefore, was made to depend expressly upon technical ground as to the validity of the *form* of the warrant. At the same time, a proposition is laid down by the Court in Error, under cover of which a repetition of the unseemly litigation may occur:—"Writs issued by a superior court not appearing to be out of the scope of their jurisdiction, are valid of themselves without any further allegation, and a protection to all officers and others in them, and acting under them, and that although on the face of them they be irregular." After these specimens of discordant opinions, we think that our readers will agree with Mr. May, that it would "be presumptuous to define

the jurisdiction of the courts, or the bounds of parliamentary privilege." The only conclusion at which one could arrive safely, perhaps, would be that of Lord Kenyon (in *R. v. Wright*), who said of a certain proceeding, that it was "by one branch of the legislature, and therefore we cannot inquire into it;" but "I do not say," added he—to put the balance of doubts as before—"that cases may not be put in which we would inquire whether the House of Commons were justified in any particular measure."

"With these conflicting opinions," says Mr. May, "as to the limits of parliamentary privilege, and the jurisdiction of courts of law, if either House of Parliament insist upon precluding other courts from inquiring into matters which are held to be within its own jurisdiction, the proper mode of effecting that object is the next point to be determined. If the courts were willing to adopt the resolutions of the House as their guide, the course would be clear. The authority and adjudication of the House would be pleaded, and the courts, acting ministerially, would at once give effect to them. But if the courts regard a question of privilege as any other point of law, and assume to define the jurisdiction of the House, in what manner, and at what point, can their adverse judgments be prevented, overruled, or resisted? The several modes that have been attempted will appear from the following cases; but it must be premised, that when a privilege of the Commons is disputed, that House labours under a peculiar embarrassment. If the courts admit the privilege, their decisions are liable to be reversed by the House of Lords; and thus, contrary to the law of parliament, one House would be constituted a judge of the privileges claimed by the other. And if the privilege be denied by the courts, the House has no other remedy, in the ordinary course of law, but an ultimate appeal to the House of Lords. It is difficult to determine which alternative is the least satisfactory—the denial of a privilege by the Lords on a writ of error, or on application to them for redress when the authority of the House has been discredited by an inferior tribunal. With these perplexities before

them, it is not surprising that the Commons should frequently have viewed all legal proceedings, in derogation of their authority, as a breach of privilege and contempt. They have restrained suitors and their counsel by prohibition and punishment, they have imprisoned the judges, they have coerced the sheriff; but still the law has taken its course."

That the Houses of Parliament should possess and exercise every requisite power for sustaining their high functions, must be the desire of all who value constitutional government. That they should not claim or usurp more powers than are requisite, should be the wish of each English subject who appreciates his own liberty and the advantages of living in a free country. A body of six hundred and fifty-four men may prove as pressing a tyranny, if irresponsible, as an emperor with a government of bayonets. The real freedom of a country depends upon the supremacy of the law, not of a legislative assembly. "Privileges," if admitted, are so admitted because they are a part of the law. If they clash, it is but the collision of one part of the law with another part. When this unfortunately happens in other branches of our system, we apply a remedy by stricter definition and more accurate limitation; or by adopting a procedure by which each occasion of the conflict of domestic laws may be considered on its merits, and decided upon well-established principles.

The dignity of the House of Commons, in respect of its jurisdiction, would suffer less by adopting the latter suggestion than by again sustaining damaging defeats, or more damaging victories, at the hands of courts of law. Jealousy and touchiness arise frequently from uncertainty of position and the natural timidity of losing something of it. If the essential boundaries of parliamentary privilege (however wide they may be) were known and fixed, the House would suffer little panic as to their infringement. In the "Proœmium" to the Fourth Institute occurs the following passage, which at least is free from suspicion:—

Among many and various similitudes and characteristic conceits of phrase, it is said—"For as the body of man is best ordered

when every particular member exerciseth his proper duty, so the body of the Commonwealth is best governed when every serviceable court of justice exerciseth his proper jurisdiction. So in the Commonwealth (justice being the main preserver thereof), if one court should usurp, or encroach upon another, it would introduce uncertainty, subvert justice, and bring all things in the end to confusion." The learned author thereupon considers the various jurisdictions. "And thus, for all our pains, wishing the benevolent reader all the profit, we (*favente Deo et auspice Christo*) begin with the high and most honourable court of parliament:" which *we*, however, for the present have done with; entertaining, nevertheless, the same amiable wish for *our* benevolent readers.

We will, however, add one word more, suggested by the perusal of Mr. May's book:—It has attained to a position of authority, not only in England but in those of her colonies also, where parliamentary institutions are growing, modeled on that of the mother country. Whilst our colonial brethren enjoy the advantage of the accumulated experience of centuries, the forms and principles which have grown here are proved well adapted to the wants of an English and free people wherever planted. In some points, however, relating to matters of privilege, such as those we have been led, in the preceding pages, to discuss, the difficulties which the mother country has drifted into may, we trust, be avoided by the wisdom of her offspring duly profiting by her troublous experience.

ART. II.—THE TENURE OF REAL PROPERTY IN THE ISLAND OF GUERNSEY.

LANDED property in the island of Guernsey is for the most part held in fee, subject to the payment of certain perpetual “rentes.” These owe their origin to circumstances and incidents which we will proceed to describe :—

1st, On the sale of property, part of the consideration is reserved in the form of a “rente.” This is called *Rente du Fonds*, and is in the nature of a fee-farm rent.

2ndly, When the owner borrows money, it not unfrequently happens that, instead of granting a mortgage upon his property, he charges it with a perpetual “rente.” This is called *Rente Constituée*, and is in the nature of a rent-charge.

3rdly, When property is divided between coparceners, one of them frequently takes a larger portion of the land than would fall to his share, and makes up the difference by charging his portion with perpetual “rentes” in favour of his coparceners. These are called *Rentes retours de Bille de Partage*.

These several modes of creating “rentes” have been in operation since the earliest times ; and almost all the landed property in the island has thus become encumbered with irredeemable “rentes.” Most of these “rentes” are payable in kind ; wheat “rentes” are the most common, but they are occasionally made payable in other produce, such as capons, fowls, ducks, a loaf of bread, or an eel !

All “rentes” are due in October, but the average prices of corn, &c., are not found until the Easter following ; so that, if they are paid in money in lieu of kind, the payment cannot take place till after that time.

On the sale of real property the price is always calculated in wheat “rentes ;” so that when a man has either house or land to dispose of, he sells it to another, to hold to him and his heirs for ever, paying yearly so many quarters of wheat as may be agreed

upon; for which payment he that takes binds himself and his heirs for ever, on the security or guarantee, as it is termed, of his own property, present and future, real and personal, and that of his heirs. It is sometimes agreed that this guarantee shall not be created, but in the absence of express stipulation to the contrary, it will be implied in law.

This species of sale for a "rente" is called *Bail à Rente*, and is thus defined by Pothier:—"Le bail à rente simple est un contrat par lequel l'une des parties baille et cede à l'autre un héritage ou quelque droit immobilier, et s'oblige de lui faire avoir à titre de propriétaire, sous la réserve qu'il fait d'un droit de rente annuelle d'une certaine somme d'argent, ou d'une certaine quantité de fruits qu'il retient sur le dit héritage, et que l'autre partie s'oblige réciproquement envers elle de lui payer tant qu'elle possèdera le dit héritage."

A "rente" may, at the will of the contracting parties, be originally made "assignable" or "rachetable," and a *Rente retour de Bille de Partage* is said to be in law both "assignable" and "rachetable," independently of any agreement, although a long-established custom, whilst leaving it "assignable" has deprived it in practice of its "rachetable" quality. If a "rente" is "assignable," the debtor may, at his own will, substitute some other "rente" equally well secured for it. If "rachetable," the debtor is entitled to redeem it at any time at the price stipulated in the contract.

When an estate is sold, all the "rentes" due upon it are required to be specified in the contract, or instrument of conveyance, and the vendor (in order to free himself from the payment of them in future) has to deliver to the owner of each "rente" an exemplification of the contract, under the seal of the bailiwick. These exemplifications are denominated "droits." When the whole estate on which a "rente" is due is alienated, the "rentier" or owner of the "rente" cannot object to accept the "droit." But if a part only of such estate is alienated, and the vendor has fixed on such part the "rente" due on the whole, the "rentier" may be compelled by law to accept it, if the part alienated is

deemed of sufficient value to answer the "rente." Although the owners of the "rentes" accept the purchaser as their debtor, they still retain the guarantee of the seller.

On this subject of guarantee, it may be observed that, where a "rente" has been created on a certain piece of land, the whole of the land remains a perpetual guarantee for the "rentes" originally charged upon it, even though all or part of such land may have been sold since the creation of the "rente;" also, where a "rente" is due upon one piece of land, every part of the real property belonging to the owner of such land, even though subsequently alienated, is a guarantee for the "rente," in the absence of any stipulation to the contrary. The liability of the part alienated is barred by prescription, the period of which begins to run from the time of the alienation. Moreover, if one already possessed of land afterwards purchases or inherits other real property, such after-acquired property becomes liable for the "rentes" or other charges due upon the property he possessed before; but under special enactments of modern date, such after-acquired property may become discharged in the hands of a subsequent purchaser.

When the owner of landed property is not able to pay the "rentes," or other charges due thereon, legal measures are taken, the consequence of which is that the estate falls "*en saisie*," as it is termed. In this case, all claims upon the estate have to be entered upon a register at the "*Greffe*" office, and certain proceedings are taken, the object of which is to secure the claims of encumbrancers in the order of priority. When the estate consists of one property only, the case is in its simplest form. The encumbrancers are called upon in the order of posteriority—i. e., the most recent is called on first either to accept the estate, with all its encumbrances, or to give up his own claim; and if he refuses the offer, it is repeated to the others in succession, until at last an encumbrancer is found willing to take the estate, subject to the claims of all prior encumbrancers.

But when the estate, "*en saisie*," is composed of several properties inherited or purchased at different times, and severally charged with perpetual "rentes," the proceedings assume a very

complicated aspect ; and if the estate, collectively, is not worth the whole of the encumbrances due upon it, it becomes necessary to investigate the titles of each separate property ; and the "rente" holders, independently of their claim upon the estate collectively, are entitled to disconnect the different properties—the one from the other—and to attach themselves each to the particular property charged with his "rente." If any questions of guarantee arise, other parties are brought into the suit with a view to their being sent before a commissioner of the court, who has to examine into their respective titles. A report is then drawn up by the commissioner, setting out the order in which, as well the claimants upon the estate, as those who are liable as "garans," should be called upon to speak in the "saisie." The claimant of most recent date would have to speak first, and three courses would be open to him :—1st, To take the whole estate, and bind himself to pay all the other charges upon it. 2ndly, To take the part charged with his "rente," and pay the other charges upon that part. 3rdly, To give up his claim.

In the event of his giving up his claim, the next claimant is called upon in like manner, and the final result of the proceedings is, that the whole estate becomes the property of one of the claimants, or the different parts become the separate property of some one or other of the owners of "rentes" upon them.

All persons liable to guarantee are called upon at their respective dates, either to take the "saisie," or to give up the property liable to guarantee.

Real property is not devisable by will, except in cases in which the possessor has no descendants in the direct line ; but, on the death of a father, the eldest son takes as his "préciput," or eldership, the most valuable buildings, standing within an area varying from fourteen to twenty-two perches, the extent of which variation is determined by the "Douzaine," or parochial ward. The remainder of the estate, together with any "rentes" (for "rentes" are real property), is divided amongst the co-heirs (the eldest son himself included), in the proportion of two-thirds to the sons, and one-third to the daughters, subject, nevertheless, to the condition,

that a daughter shall inherit no more than a son, nor a son more than twice as much as a daughter. But the eldest son may, besides his "préciput," take at a valuation to be put upon it by the "Douzaine," as much as he pleases of the land connected with the "préciput" as lies within the "enclos," or ring fence of the estate, or the whole of the estate if it form but one "enclos," which is but rarely the case in Guernsey; and, if the whole of the land within the "enclos" is of less extent than one-third of the estate, he may take so much land outside the "enclos" as will make up one-third of the whole estate.

For the excess of land over the "préciput," which the eldest son thus takes, he is obliged, unless a money compensation be mutually agreed upon, to compensate his co-heirs in "rentes" for their proportion of such excess. These "rentes" may either be the "rentes," if any, forming part of the estate of the deceased, or "rentes" specially created by the *Bille de Partage*. These being, as we have seen, "assignables," the eldest son may free the property from the encumbrance by substituting some other "rentes" of equal amount.

In collateral succession, real property is divided between brothers and sisters in the same proportion as above stated. The eldest brother, however, has no advantage over his co-heirs; and if nephews or nieces represent their deceased father or mother in the succession, they subdivide among themselves the portion thus coming to them in the same proportions as if it had come to them directly from their deceased parent.

Heirs are "garans" to each other for the "rentes," and other real property inherited and divided between them, until this liability is barred by prescription.

It may be worth while to observe that a similar system of "rentes" (except that a "rente constituée" was always redeemable) formerly prevailed in France, but in that country great alterations in the law have from time to time been made. The first of these was in the year 1441 A.D., during the reign of Charles VII., when all "rentes" due on houses in the town or faubourgs of Paris were made redeemable. The reason given being,

that a great number of houses, being charged with "rentes" above their value, were allowed to fall to ruin; and, by a law passed in the reign of Henry II., this privilege was extended to all the towns in the kingdom. At last, at the time of the French revolution all perpetual "rentes" were made redeemable.

The system of "rentes," which the people of Guernsey inherited from their Norman ancestors, is one to which they are much attached. Their tenure of land and their family arrangements are based upon it; and so jealous are they of any interference with it, that when the states, last year, adopted a *Projet de Loi*, which was sent up for the consideration of the Privy Council, for the redemption of small "rentes" under the yearly value of one quarter of wheat, and of money "rentes" under the value of twenty shillings, a large party among the inhabitants, many of them members and ex-members of the states, not only stoutly opposed the *Projet de Loi* before the states and the Royal Court, but afterwards petitioned to be heard by counsel before the Privy Council in opposition to it; stating in their petition, that the proposed redemption would be a flagrant outrage on the feelings of the petitioners, as these small "rentes" had been in their possession, and in that of their ancestors, from time immemorial, and constituted their real property; that the existence of such "rentes" stimulated the purchasers of land to industry, and enabled the vendors to retain for themselves, and their heirs for ever, a permanent interest in the land disposed of by them; the results whereof were the wide-spread prosperity and harmony which subsisted amongst all classes of the inhabitants of the island. The petitioners ended by saying that the public in general, instead of being benefited by the redemption of small "rentes," would experience all the effects which a social revolution never fails to produce, and which would be highly detrimental to the best interests of the island. Notwithstanding this opposition, however, the Privy Council confirmed the law, on the ground that such small "rentes" were a burden upon the real property far beyond their actual value, and that their existence, as a perpetual charge upon the land, acted as an impediment to its beneficial sale and transfer.

This system of "rentes," which gives the faculty of acquiring land in perpetuity without paying any purchase-money, though perhaps not worthy the praise given to it by the petitioners against the law for the redemption of small "rentes," has probably been of great benefit to the inhabitants of the island. Under its protection the original owners have parted with their land for an annual "rente" of as many quarters of corn as the purchasers judged they could afford to pay, after a sufficient remuneration to themselves for their labour. "Thus," says the Royal Court, in a letter addressed to the Privy Council in the year 1820, "without the necessity of cultivating the soil, the one party enjoyed the neat income of his estate secured on the estate itself, which he could resume in case of non-payment; while the other, on the due payment of the 'rente' charged, became real and perpetual owner, having an interest in the soil far above that of farmers under any other kind of tenure. Experience has proved that a spirit of industry and economy was thus generated, that produced content, ease, and even wealth, from estates which, in other countries, would hardly be thought capable of affording sustenance to their occupants. And thus arose two classes mutually advantageous to each other, the one living on its income, or free to exercise trade and professions; the other composed of farmers raised to the rank of proprietors, dependent only on their good conduct."

On the 17th March, Mr. Hadfield moved, in the House of Commons, for an address, praying the Crown to issue a royal commission for the following purposes, viz.—1. To inquire into and report on the civil, municipal, and ecclesiastical laws and customs now in force in *Jersey*—including the laws relating to the tenure of land, trust, and uses; and also the rights of the feudal lords in the said island. 2. To inquire into and report on the constitution of the tribunals by which those laws, customs, and rights are administered; and as to the practice and forms of procedure used by them respectively. 3. To inquire into, and report on, and suggest remedies for all defects in, and abuses of the laws, tribunals, and procedure, in force in *Jersey*. 4. To inquire into the state of pri-

sons in the island ; and 5, into the administration of certain public charities.

Now, it may be thought advisable to include, within the scope of the commission, the other Channel islands in addition to Jersey.*

That the ancient laws and customs here referred to, as well as the qualities and tenures of land and its incidents, should be thoroughly understood before they are attempted to be meddled with by parliamentary reformers, is an essential condition, and highly desirable ; and so a commission, if it issues, should be very carefully constituted. We regret to say that comprehension of the subject is not always considered an essential preliminary to sweeping subversion or obstinate maintenance of institutions. There is no doubt that ancient customs, and the laws of olden times, may outlive their beneficial purposes ; and that they occasionally require modification, or even annihilation. When the right and power is preserved among a free people of regulating their own legal and social customs, the habit of self-government thus engendered generally saves their country from the anomaly and inconvenience of the institutions and procedure being immediately at variance with the wants and character of the people. The laws and the community may not be invariably of commensurate growth, but we do not find revolution or external influences requisite to effect the desired concord between them. How this royal commission comes to be wanted, and how it will operate, we do not know ; but we trust that the interests of the inhabitants of the Channel islands, as well as those which England has in their contentment and prosperity, will be well considered before any important steps be taken to remodel their laws, customs, or institutions ; and that those to whose hands the duty of inquiry and recommendation is confided will recollect, that sometimes what is theoretically ill-advised or peculiar in the eyes of a stranger, may, nevertheless, work very satisfactorily to those habituated to their own forms.

It requires an enlarged and acute understanding to reform even that with which we are ourselves familiar, and to remedy that

* We regret that this course has not been taken.—Ed.

which affects us, according to our own experience and knowledge ; *à fortiori* is it a task demanding sagacity, temperance, deliberation and carefulness, when the ancient code of a people, who cherish especially their own nationality, is to be brought to the inquisition and tests contemplated, we presume, by the House of Commons, in their purposed address to the Crown.

ART. III.—COSTS IN THE PROBATE COURT.

A PHILOSOPHIC writer in this Magazine has lately suggested a new theory of costs, and has supported it by convincing reasoning.*

For any improvement in the theory of law we all should be grateful. But whilst we are seeking to obtain what is not, we are in danger of losing an excellent doctrine of costs already having a *de jure* existence. The doctrine of costs to which we now allude is one of equitable range and application, and the loss and injury to the interests of the public through its extinction or suspension will be great, abstractedly and practically.

The prevailing and anxious feeling of the present age is for an infusion of equity and equitable principles into every branch of the body of the law. The harshness of law is not felt and deplored, until its empire is complete and superior to all evasion. A want of equity is therefore more felt, now that law, the mere *strictum jus*, is obeyed without hesitation or reserve. One of the equitable doctrines of costs in vogue in the Prerogative Court forms the subject of this article. The doctrine alluded to is that of giving costs out of a deceased person's estate to the unsuccessful party in a testamentary suit. This doctrine, as we have said, has a *de jure* existence ; for the 23th section of the Probate Court Act, 1857, provides that "the practice of the Court of Probate shall, except where otherwise provided by the act, or by the rules or orders made under the act, be, so far as the circumstances of the case will admit, according to the practice in the Prerogative Court."

* *L. M. & R.*, Vol. V. p. 301, August, 1858.

Rule three of the Contentious Rules of 1857, also provides that "next of kin and others who, previous to the passing of the act, had a right to put executors, or other parties entitled to administration with the will annexed, upon proof of the will in solemn form of law, shall continue to possess *the same rights and privileges*, and be subject to the same liabilities with respect to costs as heretofore."

It may be therefore safely concluded that it was the intention of the legislature, and the framers of the rules, to invest the new court with all the equity of the old one, at the same time that it created a procedure for that court better adapted to the exigencies of the times. It is equally inferrible that the legislature intended the annihilation of the old feud of the Courts Christian and the Common Law Courts, by erecting a new judicature formed on the best principles of both.

These were the real, if not the avowed objects of the legislature in making a new tribunal, instead of merely transferring the jurisdiction of the old courts to the existing Common Law Courts, as urged by Mr. Collier, whose arguments, unless met by such reasoning, would have been irresistible.

As all the world knows, the procedures of our native Common Law Courts, and of our native Ecclesiastical Courts, were not more contrasted than their principles were repugnant to each other.

"Numina vicinorum

Odit uterque locus, quum solos credat habendos

Esse deos, quos ipse colit."

And there was no hope of reconciliation or assimilation of these conflicting principles in the separate existences of the two laws—the ecclesiastical and the municipal—on the subject of the litigation of wills. But the country and the legislature knew that there was much good and fertilizing matter in the old Augean stable, and therefore judged that it could be transferred to other ground with great prospective benefit to the English public. For these reasons, it was determined not purely and simply to make a Common Law Court, but to make a Court of Probate, approxim-

ing in its procedure to the Common Law, but also, in all respects where it could be done, resembling the other in its principles.

The general subject of the court and its practice we do not propose here to discuss. It is our intention only to touch upon one point, and that is, the mode of treating or administering the subject of costs which obtained under certain conditions in the Prerogative Court, and which has been, *inter alia*, invoked into the new court, as we have seen.

In the Prerogative Court a wholesome equity prevailed upon the subject of costs, after sentence given for or even against a will or codicil. This equity might be claimed, and would be allowed to a next of kin or to an executor, under circumstances which, in a common law court, would have brought upon either a condemnation in the costs of the other side. An ousted next of kin might impugn the execution of a will, the capacity of a testator, or his freedom from control or importunity; upon all or any of these suggestions, he might impose upon an executor a searching curial inquiry into all the circumstances preceding, attending, and following the preparation and execution of a will. He might set up, in antagonism to the will, an array of facts which would call for a rebuttal, or at least an explanation. He might do all this, and fail in obtaining sentence against the will. And yet the court would not only not visit him with the executor's costs, but would give him all the costs of that unsuccessful opposition out of the testator's personal estate.

Again, an executor might set up (or as it was called propound) a will or a codicil, which the court, upon better information than the former possessed, might pronounce against. And yet the executor's costs would be allowed him out of the estate. This was a practice of the Prerogative Court constantly acted upon, and never liable to be misunderstood by the judge or the practitioner. The principle which underlay this practice may be formulized thus:—It was an assumption that a man might set up a will, and that a man might dispute a will, without necessarily, in case of failure, being culpable of such conduct as should make it requisite or desirable that he should be punished with costs; for costs are,

undeniably, as much a punishment to the one party as they are an indemnification to the other. The court supported this assumption, by holding that the matters and circumstances attending the preparation and execution of a will might be entirely out of the personal ken of either executor or next of kin; and that, independently of the instrument itself, all necessary information might have to be gained from other persons, who might colour, garble, or altogether withhold from the interested inquirer all that vitally concerned him, and that he most wanted to know. An inquiry made by such a person, under such circumstances, the judge knew to be always useless, and generally impracticable.

This state of things, in the opinion of the court, plunged the party into an *inopia consilii*, disabling him as well from inquiring accurately, as from deciding justly, upon his own case, from which the court only could relieve him, by making the inquiry as well as pronouncing the decision for him. But as the court made the inquiry for him on general principles, and for the protection of society, it followed that the court should relieve him from the consequences of costs, if his conduct in promoting the inquiry was marked by no more than a just regard to his own legitimate interests. And *this* was the practice of the court which we are now considering.

Dr. Tristram, in his excellent little treatise upon the practice of the Probate Court in contentious matters, lays down Four Canons upon this subject. He says—"Where a party has unsuccessfully contested the validity of a will, and his case comes within one of them, he will be entitled, subject to certain limitations which will be mentioned, to costs out of the estate.

"1. When a party has been led into the contest, whether as plaintiff or defendant, by the state in which the deceased has left his papers.

"2. When there is reasonable doubt as to the testator's testamentary competency at the time of the execution of the will.

"3. Where a party, principally benefited by the will opposed, has been guilty of improper acts, which have exposed him to the suspicion of fraud or undue influence in procuring its execution.

"4. Where a case, from its peculiar circumstances, pre-eminently calls for investigation."

To these four we will venture (*sit venia*) to add—

5. Where a legal doubt exists as to the execution of the will.

These canons are so startling to a mind habituated to the study of the common law only, that we think our readers will require us to prove, as well as illustrate, them by excerpts from the reports of Doctors' Commons. We will do so from the most accessible reports, illustrating each canon in its order. We will then first cite cases in illustration of the *First Canon*:—

In *The Countess de Zichy Ferraris v. The Marquis of Hertford and Others*—(2 Notes of Cases, p. 263). An allegation propounding unattested testamentary papers as codicils, on the ground of their being incorporated with the will, was rejected by the court. The expenses were directed to be paid out of the estate on all sides.

In *Townley v. Watson* (3 Curt., p. 770), obliterations of legacies were held to be valid as revocations. The court gave the legatees, who were opposing parties, their costs out of the estate.

In *Bunny v. Hemsted* (3 Notes of Cases, p. 599), certain papers, apparently inconsistent with themselves, were pronounced for, the next of kin opposing. Sir Herbert Jenner Fust directed the expenses on *all* sides to be paid out of the estate; observing, "It is a very proper case to be brought before the court."

The *Second Canon* may be illustrated by the following cases:—

In *Waring v. Waring* (5 Notes of Cases, p. 324), a will was pronounced against on the ground of insanity. The court gave the executors propounding it their costs out of the estate.

In *Borlase v. Borlase and Others* (4 Notes of Cases, p. 140), a will and codicil were opposed on the ground of insanity, but a lucid interval was proved. The court gave the next of kin their costs out of the estate, observing, "I think, at the same time, that these ladies were fully entitled to put the party upon proof of the papers, that the question was one of difficulty and doubt, and I am of opinion that they are entitled to have their expenses paid out of the estate."

In the cases of *Mudway v. Smith, The Executors of Mudway deceased*, v. *Croft Committee of Wicks, a lunatic* (2 Notes of Cases, p. 459), the court pronounced for a will of a lunatic having lucid intervals, on evidence that it was executed in a lucid interval. The court gave the next of kin her costs out of the estate, observing, "Under these circumstances, I am clearly of opinion that the costs must be paid out of the property, as the case is one which required to be sifted."

In *Frere v. Peacock* (1 Robertson, p. 456), a will was opposed on the ground of insanity, but was pronounced for. The court gave the next of kin his costs out of the estate.

With regard to the *Third Canon*, we will cite *Jones v. Godrich* (3 Notes of Cases, p. 510). Here a will was pronounced for, but circumstances being proved showing that the transaction on the part of the executors was tainted, the judicial committee said, "We think this litigation was fully justified," and gave the next of kin her costs out of the estate.

The following are illustrations of the *Fourth Canon*:—*Keating v. Brooks and Others* (4 Notes of Cases, p. 273). Here one of the attesting witnesses to a will deposed that her name was forged, and that the paper propounded was not that which she had subscribed; and the other attesting witness deposed the contrary. The court upheld the will, but gave the next of kin their costs out of the estate. The court said, "It is better that the costs should come out of the estate. Mr. Keating is the writer of the will himself."

Again, in *Gregory v. Her Majesty's Proctor and Others* (4 Notes of Cases, p. 643), the court pronounced, "After much hesitation and doubt, those were the papers intended by the deceased to have operation as his will, and that he executed in compliance with the act." Here the court gave all parties their costs out of the estate.

In *Coventry v. Williams* (3 Notes of Cases, p. 172), a paper was propounded by the executor, and probate was refused of it. The court gave the executor his costs out of the estate, "as it was necessary to propound it."

In *James v. Roberts, West, and Others* (3 Notes of Cases, p. 324), an executor and an intervening party propounded a will as revived, but the court held the contrary. The court gave the costs of all out of the estate.

In *Payne v. Trappe* (5 Notes of Cases, p. 485), the court did the same thing under the same circumstances; and so, also, in *Neate v. Pickard* (2 Notes of Cases, p. 409).

In *Symons v. Tozer* (3 Notes of Cases, p. 55), the will of a testator was pronounced for, though it was made at a late period of his life, and contained a disposition totally at variance with a former will, and repugnant to a motive recorded in that will. But the opposing next of kin obtained a decree for his costs out of the estate. The judge said, "My opinion is, that the case required to be investigated, and that the party opposing the will, from the circumstances stated, is entitled to his costs out of the estate. The facts of the case required investigation."

In *Wood and Others v. Goodlake, Help, and Others* (1 Notes of Cases, p. 160), of which most persons have heard more or less, the confusion lay at the door either of the testator or his executors. The judicial committee, in giving judgment, said, "We think it reasonable and proper, in this case, that the costs of all the parties, as well here upon the appeal as in the court below, should be paid out of the estate."

Lastly, in *Hudson v. Parker* (3 Notes of Cases, p. 250), when a will having been pronounced against for defective attestation, all parties' expenses were decreed out of the estate.

We come now to the *Fifth Canon*. In *Leech and Others v. Bates*, (6 Notes of Cases, p. 708), two codicils were pronounced for, the witnesses deposing against their execution, but the presumption being for it from other circumstances. The court gave the costs of *both* parties out of the estate.

In *Brooks, formerly Reeve, v. Kent* (1 Notes of Cases, p. 100), the question raised was as to the construction of the 1 Vict., c. 26, s. 21, upon alterations made by the testator in his will. The judicial committee of the Privy Council directed "all costs to be paid out of the estate."

In *Gaze v. Gaze* (2 Notes of Cases, p. 230), the execution of a will, on the point of legal acknowledgment of the signature, was unsuccessfully disputed by a next of kin. The will being pronounced for, the judge said, "I also think, the question being created by the act of the deceased, that the other parties' expenses should be paid out of the estate."

In *Hooley and M'Quiggin v. Jones and Jones* (2 Notes of Cases, p. 61), the execution of a will was contested. The court was of opinion that the evidence was not sufficient to support the will, and pronounced against its validity, but gave the executor who propounded the will his costs out of the estate.

In *Burgoyne v. Showler* (3 Notes of Cases, p. 208), a will was opposed on the ground of defective execution under the statute, but was pronounced for. The costs of the next of kin were decreed to be paid out of the estate.

In all these cases we trace the general principle, that there are sets of circumstances in which the unsuccessful opponent or propounder of a will, as having a right to call for inquiry (which, to be effectual and satisfactory, must be curial), or being under the obligation to support the will, has an equity which entitles him to the costs of his inquiry. It is established in these cases that costs, if they are to be considered a penalty, should be levied from the person who made the inquiry necessary—viz., the deceased; for the contest has arisen through his own act, or an exceptional condition in himself, or a difficulty in the application of the statute. In all these cases we have a recognition that a suit respecting the validity of a will, is not to be regarded in the same light as that which lies at the instance of a creditor against his debtor. The plaintiff and defendant in the will cause have no assimilation to the plaintiff and defendant in the action for debt, and the reason is obvious. In the will cause *the plaintiff and defendant are both instituting an inquiry*—are each endeavouring to arrive at truth out of a tangled web of discordant facts; the result of this inquiry they know not, and for the result they should not be personally liable.

It seems almost superfluous to speak of the good which must

result from the operation of such a principle as this when judiciously applied. It relieves an innocent man from a weight of costs under which he might sink, and it enures to the benefit of society, by encouraging an inquiry into all cases that require it.

We have thus seen the principle of the Prerogative Court, both in the abstract and in the concrete ; both in the formula and in its application. It appears to us to be a principle worthy of conservation, and the legislature has been of the same opinion, by enacting its preservation—leaving, of course, its application to the judge. It undoubtedly kept the old court on its legs, in spite of a lame and vicious procedure, by securing to it the public respect.

A year has passed since Sir C. Cresswell undertook the most arduous task that can fall to the lot of man—the formation of a new court ; and the legal world knows how well he has acquitted himself of that labour. *Crevit enim cum amplitudine rerum vis ingenii.*

The judge of the Probate Court, however, has set his face sternly against the equitable principles of costs now under discussion. It is tabooed in his court ; and this valuable inheritance, transmitted to that court for the use of the public, may possibly be lost from disuse. We regret that the learned judge has exiled equity from a court which the legislature intended should have it. On this point he has thrown back the tide of equity, and left his court in all the dryness of common law. Hence we have a purely common law court, when the legislature contemplated a mixed one. This is retrogression. Judicial inquiry into will cases should be encouraged, for there is no class of cases where villany is more rife ; and there is no kind of villany which can less stand the brunt of an inquiry, for the simple reason that to support a bad will many bad men must combine.

Again, an inquiry of this kind is most needed by those who are least able to pay its costs—namely, the poor and disinherited. To tax these persons with costs, in all cases where they fail of success, without regard to the nature and degree of their opposition, is not to discourage, but to annihilate inquiry, and to encourage for succeeding generations the perpetration of fraud,

by making will cases a good preserve and a sure find for malversation.

This is not merely the question of the attorney getting his livelihood. It is a question whether a compatriot, having a grievance against a dead man, shall be mulcted in a penalty to a living man, because he has demanded and obtained an inquiry into the grounds and circumstances under which that loss has occurred. The question, Who shall pay the costs? is not merely a question, Who shall pay the attorney?

But a graver sub-question is involved in it. We will even say, according to precedent, that no sympathy is required for the attorney. We will laugh at him, with the mock sympathy of the poet, who says or sings—

“ Miser homo est qui sibi quod edat quærit et ægre invenit,
Sed ille est miserior qui et ægre quærit et nihil invenit !”

Moreover, the injustice is obvious of withholding a benefit from the world because some few do not deserve it; and such a negation is palpably unnecessary, when it is considered that the arm of the law is always strong to reach the really peccant individual. It is like physicking a crowd for the distemper of one man. To repeal a use because of a possible abuse, should be as indefensible in law as it is inconsistent with sound ethics. It may be said that this is done to discourage litigation; but here we have a clear fallacy. It is no province of the law to discourage litigation purely and simply. It is the duty of the courts to discourage unjust and vexatious litigation only. If all just and unjust litigation be punished alike, society is punished in the persons of the innocent for the fault of a few individuals. Under the influence of such a practice, Wood of Gloucester's case would never have received its great and world-wide adjudication, or any adjudication at all; and it must never be forgotten that that adjudication transferred immense property to *miserabiles personæ*—persons without funds to go to war with on their own charges. The refusal to allow costs will kill inquiry in the bud; it will engender morbid dissatisfaction in families, which an inquiry would have

removed or alleviated ; and it will restrain within the narrowest compass the operation of the act of parliament.

We regret that so distinguished a judge, and so able a reasoner, should have taken a course so counter to the practice of Dr. Lushington and Sir Herbert Jenner Fust ; and we think that the learned judge cannot have *approfondi* the full logical consequences of his exceptional practice.

ART. IV.—*Shakespeare's Legal Acquirements Considered.* By JOHN LORD CAMPBELL, LL.D., &c., in a Letter to T. PAYNE COLLIER, Esq. London : John Murray, 1859.

EARLY one winter's morning this year, there was great consternation perceived among those grave and thoughtful men who obey daily their sad destiny, which condemns them to pass and repass for an allotted period the south gateway of Lincoln's Inn—that gateway we mean which the frugal Benchers now piece off, and let out to a bookseller. The cause of this emotion was obvious. Large placards, in blood-red letters, were adhering to this bookseller's window, with this query printed in the boldest and most unabashed type, "Was Shakespeare an Attorney's Clerk? By John Lord Campbell." Hardly any query could have seemed to the sage pedestrians at first sight so pointless and wild as this. Many had for years been familiar with modest advertisements wafered on these windows, to the effect that various masters wanted clerks, "respectable, sober, clever," &c. &c., and that clerks with irreproachable hands (so far as writing at least extended) would accept of masters on easy terms. Hurried memoranda, also, might continually be seen stuck up as to bunches of keys lost late the previous evening under circumstances not mentioned, or occasionally as to a bank-note, of no use except to the owner, because the number was known, and the registered title thereto vitiated by an official caveat. It was of every day's experience that the loss of deeds, wills, and docu-

ments, supposed to have been either left by a country attorney in a cab, or dropped in a square (but eventually discovered in a tavern in Fleet-street, or safe at the office at home), were advertised in this quarter. But that an unexpected question, combining the ideas of Shakespeare, Lord Campbell, and Attorneys' clerks, should here be put forth and in this startling fashion, seemed like a practical joke.

Was Lord Campbell to be literally supposed to have asked or answered the interrogatory here printed in the blood-stained type? Had the passers-by seen propounded in like words and figures, such a question as—"IS TITMOUSE TO BE THE NEXT MASTER IN LUNACY?" or, "SHOULD A NEW STATUTE COMMISSION (AS EFFICIENT AS THE LAST ONE) BE AT ONCE APPOINTED?" we believe that less astonishment would have been felt.

The next step after astonishment is, to the candid mind, naturally investigation. In this instance the latter process has led us to the result, that a little book, and we may say a little amusing book, has certainly been made and published by Lord Campbell. It would appear that Lord Campbell had "a little leisure during the long vacation" of 1858, and, in obedience to a "peremptory" request of Mr. Payne Collier, his lordship undertook the duty of throwing out a few hints on the subject referred to in the placard, for the especial use of the well-known editor of our great dramatist's works; the writer having however, besides, another very natural, not to say national, motive for the labour; for, says the noble and learned author, "I myself must derive some benefit from the task." He believed, in fact, that the mental effort of reading the plays (or studying Mrs. C. Clarke's concordance) would, for a while, draw from his "mind the recollection of the wranglings of Westminster Hall." "In literary pursuits," confesses the candid and enthusiastic judge, "should I have wished ever to be engaged;" which assertion, being made in English, he quite unnecessarily proves after the orthodox fashion of ancient legal commentators, by a quotation in Latin:—

*"Me si fata meis paterentur ducere vitam
Auspiciis, et sponte meâ componere curas."*

In passing, we may remark upon this confession of Lord Campbell, so flattering to literature, that it is a matter of deep sympathy that he felt himself forced to enter upon, and now feels himself bound to continue, the task which (for the first time) we here learn is uncongenial to him. For half a century he has been self-condemned to take a part in the litigation or "wrangling" of Westminster Hall; and, when he had the opportunity of being finally released therefrom, he resumed his bonds on the bench when Lord Denman retired. He feels now, we learn, how much happier, more useful, not to say more remunerative, would have been his lot, if he had dedicated himself to literature. His proper calling was to woo the muses; to have inscribed immortal pages, rather than frame ephemeral pleas; to have composed rather than pass sentences. He believes, now that he is Chief-Justice of England, that he has mistaken his profession. This reflection must indeed, we fear, embitter his existence. Henceforth, whenever we see him on the bench, we shall be haunted with the fancy that his aching heart tells him hourly he has blighted his prospects by the great error he committed in early life, in having chosen to practise at the bar; we shall feel that he is in secret longing even now to be once again free, and able to add to the permanent and immortal literature of his country. What pangs for an aspiring soul to endure in reflecting, that whilst Shakespeare emancipated himself from the fetters of the law, and became one of the great poets of the world, Lord Campbell hesitated, and was lost—remained at the bar, and has been degraded to the Chief Justiceship of England! What has not Lord Campbell—nay, the world—thus lost? There has occurred to him, however, the rare chance of being both a literary man *and* a chief justice. To effect this combination successfully was no easy matter. The ambition of being "a wit among lords, and a lord among wits," is always accompanied with danger to reputation. Nevertheless, the learned author of this *magnus opus* on Shakespeare, ventured boldly, and became a biographer among the lawyers, and a lawyer among biographers. The latter capacity, at least, has been remarked by some who, hav-

ing been already engaged in cultivating the fields subsequently walked over by his lordship, have seemed to think, and indeed said, that with his character of biographer he conjoined very successfully that of the *nisi prius* leader; for it is well known to be an essential quality in the latter, that in the consultation room and chamber he should skilfully draw upon, and boldly appropriate, the labours of his juniors; so that, having adopted all he cares to use, he successfully parades the well-prepared and arranged learning of the younger or less known practitioner who sits behind him. From whatever sources derived, however, Lord Campbell has a recognised literary character; and this work on Shakespeare will be, we doubt not, perused in consequence.

We need hardly inform our readers that Lord Campbell's letter to "My dear Mr. Payne Collier," commits the author to no opinion whatever upon the subject he discusses. In point of fact, he keeps very safe himself, while he "chaffs" his correspondent. He sums up his evidence in the old-fashioned judicial manner. "If you think the testimony is strong enough to enable you to find a verdict for the plaintiff, you will do so; if not, you won't. Again, if the facts justify you in drawing a rational inference either in one way or the other, you will be safe in taking either course; but if not, you had better avoid the responsibility."

Many of the passages collected from Shakespeare's plays might, of course, have been written, so far as legal knowledge is concerned, by any man of the world. The whole together merely shows that our great poet, in knowledge, and in power of using it—in wisdom, and the faculty of employing it—in observation, wit, and other mental qualities, far surpassed all other men. Lord Campbell indeed admits this. He tells us, in one of the most sensible and strikingly original remarks in the book, that it behoves us to bear in mind that Shakespeare "was a mortal man, and nothing miraculous can be attributed to him." The first branch of which statement is a fact, of which contemporary testimony, and indeed the certificate of his death, sufficiently assure us; and the second branch is not open to much doubt among the orthodox. The writer seems really to sum up the

truth on this subject when he says that Shakespeare "was, intellectually, the most gifted of mankind;" and "he was capable of acquiring knowledge where the opportunities he enjoyed would have been insufficient for any other." The passage from the first act of *Henry V.*, in which Prince Hal is described, is happily applied to the dramatist himself (p. 116):—

"Hear him but reason in divinity,
And, all-admiring, with an inward wish,
You would desire the king were made a prelate.
Hear him debate of commonwealth affairs,
You would say, it hath been all-in-all his study.
List his discourse of war, and you shall hear
A fearful battle render'd you in music.
Turn him to any cause of policy,
The Gordian knot of it he will unloose
Familiar as his garter; that when he speaks,
The air, a charter'd libertine, is still,
And the mute wonder lurketh in man's ears
To steal his sweet and honey'd sentences;
So that the art, and practick part of life,
Must be the mistress to this theorick."

Above all, Shakespeare knew life in all its forms and phases—life in the great world and in the common world. He describes kings and beggars, queens and courtesans, lawyers and fools, the noble heart and the mean sycophant, the pomp of courts and the poverty of the garret, with equal truth. His poetic genius enabled him to depict what by his extraordinary apprehension he had mastered. His mind was framed to penetrate and portray man in all his moods. The conflict of the camp and the "wrangling" of the courts were alike subject to his pen. He must have been a soldier, statesman, merchant, ecclesiastic, as well as a lawyer, if vivid description of the life of each class could prove him to have personally experienced what he described.

William Shakespeare was landowner, proprietor of playhouses, manager of theatres, and hence it is not strange that he should have learnt something of leases, bonds, and generally of the law of property, of securities, and other cognate topics, with and by which lawyers' minds and mouths are filled. We fancy Mr. Lumley, Mr. Gye, and Mr. E. T. Smith—perhaps, too, Mr. Farren, Charles

Matthews, Mr. Buxton, and others in like position—would, on examination, pass very fairly in matters relating to bonds, bills, contracts, insolvencies, and much of what popular “Handy-books” now profess to reveal to the public.

Other dramatists besides Shakespeare abound in allusions to legal topics; and, seeing that almost all mankind must be more or less subjected to the lawyer as well as the physician during their lives, and so feel some interest in their doings, arising either from admiration or disgust, satisfaction or horror—it is not very remarkable to find abundance of allusions to such topics in those authors who reflect the doings and thoughts of mankind. Let us take an example, picked up cursorily from Massinger. In “The Old Law,” Act I., Scene 1, Simonides thus introduces two lawyers to Cleanthes:—

——“These are lawyers, man,
And shall be counsellors shortly.
Clean.—They shall be now, sir;
And shall have large fees if they'll undertake
To help a good cause, for it wants assistance;
Bad ones, I know, they can insist upon.
1st Law.—O, sir, we must undertake of both parts;
But the good we have most good on.”

After some interchange of remarks upon the difference between law and conscience, Cleanthes exclaims, with reference to an acute interpretation of an act of parliament—

——“A fine law evasion!
Good sir! rehearse the whole statute to me.
‘Mongst many words may be found contradictions,
And these men dare sue and wrangle with a statute
If they can pick a quarrel with some error.”

The statute in question (a very fair mock enactment) is set out at length, thereby showing Massinger's close acquaintance with the statute-book. Indeed, he may have been, so far as this passage is evidence, apprenticed in a parliamentary agent's office, who had possibly done business for the firm of attorneys in which Shakespeare was the conveyancing clerk.

Again, when Cleanthes wants the opinion of the first lawyer

upon the clause of the statute, Massinger exhibits familiar acquaintance with the *professional feelings* in the course which he now makes Cleanthes take :—

“*Clean.*—Come, sir ! I know
How to make you speak. Will this do it ?
[*Gives him his purse.*
1st *Law.*—I will afford you my opinion, sir.”

The lawyer's opinion appearing, however, to Simonides mere quibble, he bids him restore his fee —

“ Give him his fee again ; 'tis not worth two deniers.”

Mark the reply, which displays extraordinary knowledge of the detail of legal conduct :—

“ 1st *Law.*—*There is no law for restitution of fees, sir.*”

The above passage affords more palpable evidence of legal acquirements than that quoted by Lord Campbell out of “*King Lear* :”—

“*Lear.*—This is nothing, fool.
Fool.—Then 'tis like the breath of an unfee'd lawyer ; you gave me nothing for it.”

If, as Lord Campbell says, the latter passage shows “that Shakespeare had frequently been present at trials in courts of justice,” the former proves beyond all question that Massinger must have been familiar with a very important branch of chamber practice.

Another instance of Massinger's intimate acquaintance with the law of Dower is seen in the same play from which we have already quoted, when one of his characters, who desires the death of his father's widow, says—

“Then would her *thirds* be saved, too.”

Many like passages, in aid of the theory that Massinger was at one time of his life connected with the legal profession, could be adduced, but the above will in his case suffice.

We will turn next to Beaumont and Fletcher's plays. Here.

the mass of legal phraseology which we find, amounts almost to a demonstration that these authors belonged at one time to the same profession of which Shakespeare and Massinger have been proved to have been members; and if they were a firm of attorneys at an early period of their lives, the curious fact of their names being always associated in the plays would be thus explained. We therefore may assume, after the manner of Shakespearian critics, that they *were* solicitors, carrying on business under firm of "B., F., & Co." One example of the legal language employed by Beaumont and Fletcher will suffice. We will take it from "The Elder Brother." The scene relates to settling an estate on a younger son, and the following dialogue occurs:—

"*L.* Are they (the deeds) drawn?"—"B. They shall be ready, sir, within these two hours; and Charles (the eldest son) set his hand. —"*L.* 'Tis necessary; for he being a joint *purchaser*, though your estate was got by your own industry, unless he seal to the conveyance it can be of no validity."—(Act II. Scene 1.)

At page 95, Lord Campbell has an erudite note on Shakespeare's knowledge of the difference between taking by *descent* and *purchase*, which applies equally to the above extract from the firm of Beaumont and Fletcher; we will therefore borrow it as a comment thereon. "English lawyers sometimes use these terms (descent and purchase) metaphorically, like Lepidus. Thus, a law lord who has suffered much from hereditary gout, although very temperate in his habits, says:—'I take it by descent, not by purchase.' Again, Lord Chancellor Eldon, a very bad shot, having insisted on going out quite alone to shoot, and boasted of the heavy bag of game which he had brought home, Lord Stowell, insinuating that he had filled it with game bought from a poacher, used to say:—'My brother takes his game, not by descent, but by—purchase.' This being a pendant to another joke Lord Stowell was fond of:—'My brother, the chancellor, in vacation goes out with his gun to kill—time.'"

It has occurred to us, if in this imitative age Mr. Briefless (using his intervals from professional labour) should resolve to

write, and be foolish enough to publish, letters to his "Dear Mr. Alfred Tennyson," in which should be demonstrated—first, that its author was a great student of Milton's poems; and secondly, that Milton was a military man, and had seen in early youth a good deal of warfare—how many passages, full of battle scenes and manœuvres of armies, he might cite to support the theory; but we will be content with throwing out the hint, and not set the profane example.

Let us return, however, to the gracefully combined subjects of Shakespeare and John Lord Campbell, which cannot be done better than in extracting the following passage from the pen of the latter of these two great men:—

"If Shakespeare," says Lord Campbell, "really was articulated to a Stratford attorney, in all probability during the five years of his clerkship he visited London several times on his master's business, and he may then have been introduced to the green room at Blackfriars by one of his countrymen connected with that theatre.

"Even so late as Queen Anne's reign there seems to have been a prodigious influx of all ranks from the provinces into the metropolis, in term time. During the preceding century, parliament sometimes did not meet at all for a considerable number of years; and being summoned rarely and capriciously, the 'London season' seems to have been regulated, not by the session of parliament, but by the law terms—

—and prints before Term ends.—POPE.

"While term lasted, Westminster Hall was crowded all the morning, not only by lawyers, but by idlers and politicians in quest of news. Term having ended, there seems to have been a general dispersion. Even the judges spent their vacations in the country, having when in town resided in their chambers in the Temple or Inns of Court. The chiefs were obliged to remain in town a day or two after term for *Nisi Prius* sittings; but the puisnes were entirely liberated when proclamation was made at the rising of the court on the last day of term, in the form still preserved, that 'all manner of persons may take their ease, and

give their attendance here again on the first day of the ensuing term.' An old lady, very lately deceased, a daughter of Mr. Justice Blackstone, who was a puisne judge of the Common Pleas, and lived near Abingdon, used to relate that the day after term ended, the family coach, with four black long-tailed horses, used regularly to come at an early hour to Sergeant's Inn to conduct them to their country house; and there the judge and his family remained till they travelled to London in the same style on the *essoins*-day of the following term. When a student of law, I had the honour of being presented to the oldest of the judges, Mr. Justice Grose, famous for his beautiful seat in the Isle of Wight, where he leisurely spent a considerable part of the year, *more majorum*. To his question to me, 'Where do you live?' I answered, 'I have chambers in Lincoln's Inn, my lord.' 'Ah!' replied he, 'but I mean—when term is over?'" (p. 23.) It does not appear, however, that young Campbell was prepared then to give any further information as to his domicile or his means of livelihood, and the conversation dropped.

In the "good old days," when judges used to drive away from Sergeant's Inn with a coach drawn by "four long-tailed horses," the leading counsel too were wont to exhibit equipages in great style in the same neighbourhood. We have often heard that Mr. Shadwell (the great conveyancer, and the father of the late Vice-Chancellor of England) used also to have his "carriage and four" driven up to Boswell Court, to carry him to his country seat. In these degenerate days a leading Queen's counsel, if he does not hire a Hansom, contents himself with being "fetched and carried" in a neat brougham, probably *jobbed* by the month, and which "his lady" uses for shopping purposes in the morning.

Another promiscuous remark made by Lord Campbell in this page, relates to the word attorney—it is offered *apropos* of the passage where Rosalind recommends Orlando "to die by attorney." Whereupon the critic observes, "I am sorry to say that in our times the once most respectable word, 'attorney,' seems to have gained a new meaning—[that of]—a 'disreputable legal practitioner,' so that attorneys-at-law consider themselves treated discour-

teously when they are called 'attorneys.' They now all wish to be called *solicitors*, when doing the proper business of attorneys in the courts of common law. Most sincerely honouring this branch of our profession, *if it would please them*, I am ready to support a bill to prohibit the use of the word *attorney*, and to enact that on all occasions the word *solicitor* shall be used instead thereof." We observe the motive for Lord Campbell's support to such a bill, viz.—that of pleasing attorneys of high character. But, in point of fact, though there may be some weak and vulgar practitioners who dislike the title of their calling from some foolish vanity, and all may occasionally have a sense of shame at belonging to a profession where now and then a great rogue or extortionate firm is detected (and is *not* struck off the rolls by the tender court of Queen's Bench); yet, we infer, the objection to the professional name is not sufficiently common to produce a popularity sufficiently "loud" to justify the noble lord in following the magnanimous course he professes himself ready to take.

Lord Campbell's literary attempt in connection with Shakespeare's history, has at least been of advantage in one respect. It has enabled the present chief of the Queen's Bench to do *himself* justice in a certain particular—by entering upon a piece of autobiography. This has reference to the Irish chancellorship—that creditable operation of the Whig party, which at the time excited so great an admiration both of the government and the person appointed. As Lord Campbell has here seized the appropriate opportunity of recording the following fact in his judicial career, it is but fair to him to repeat it in our pages:—

"In several successive lives of Lord Chief-Justice Campbell, it is related that, by going for a few weeks to Ireland as chancellor, he obtained a pension of £4000 a-year, which he has ever since received, thereby robbing the public; whereas, in truth and in fact, he made it a stipulation on his going to Ireland, that he should receive no pension—and pension he never did receive; and, without pension or place, for years after he returned from Ireland, he regularly served the public in the judicial committee of the Privy Council, and in the judicial business of the House of

Lords. This erroneous statement is to be found in a recent life of Lord C., which is, upon the whole, laudatory above due measure, but in which the author laments that there was one fault to be imputed to him which could not be passed over by an impartial biographer, viz.—that he had most improperly obtained this Irish pension, which he still continues to receive, without any benefit being derived by the public from his services. Lord C. ought to speak tenderly of biographers; but I am afraid that they may sometimes be justly compared to the hogs of Westphalia, *who without discrimination pick up what falls from one another.*"

This latter simile is very elegant as well as forcible; but its chief merit consists in the honest support which the author here gives to the doctrine, that for a writer of biography to plagiarize "*without discrimination*" is swinish conduct—*i. e.*, dirty and selfish. We may carry the remark still farther, and express equal distaste to pirating *with* discrimination; a process sometimes described as borrowing without acknowledgment.

ART. V.—*Speech on the Laws relating to the Property of Intestates, in the House of Commons, February 17, 1859.*
By P. J. LOCKE KING, M.P. London: Ridgway, 1859.

LORD CHIEF JUSTICE HALE hath observed in his essay touching "Amendment of Lawes," Cap. I. :—"An overbusy meddling with the alteration of lawes, though under the plausible name and pretence of reformation, doth necessarily introduce a great fluidness, lubricity, and unsteadiness in the lawes, and renders them upon every little occasion subject to perpetual fluxes, vicissitudes, and mutations. When once this law is changed, why may not that which is introduced be changed, and so onwards in perpetual motion? So, possibly in the period of an age or two, the law of a kingdom, and with it its government, may have as many shapes as a silkworm hath in the period of a year; so that

they that now live cannot project under what lawes their children shall live ; nor the child or grandchild understand by what lawes the kingdom was governed in the time of their father or grandfather ; and thereby the constitution of the government, the rule of property, and all things that are concerned to have the greatest fixedness that may be, shall become as lax and unstable as if every age underwent a new conquest from a foreign state."

In quoting the above passage in connection with the publication placed at the head of this article, we are far from wishing to imply that all the measures for the reform of the law, introduced by Mr. Locke King during his parliamentary career, are open to the objections alluded to by Sir Matthew Hale. Indeed we admit, as most will admit, that some enactments which owe their parentage to Mr. Locke King's parliamentary energy, have effected real and beneficial reforms, and have removed from our laws absurdities which it is only surprising should have been left so long untouched, and which it is still more surprising should have been swept away, not at the instigation of a legal member of the legislature, but at that of a layman.

It is to Mr. Locke King's zeal and perseverance that we are indebted for the act (17 & 18 Vict., c. 113) which renders real estate in the hands of an heir or devisee primarily liable to the payment of all mortgage debts with which it is charged ; and also for the act (19 & 20 Vict., c. 94) which abolished the special customs of London, York, and other places, concerning the distribution of the personal estate of intestates. Of these measures Mr. Locke King seems to be, and may justly be, proud. But the remarks of Lord Chief Justice Hale are, nevertheless, peculiarly applicable to the proposed alteration in the law of descent of real estate, unless better reasons and more sufficient grounds than we have yet met with can be adduced for its introduction. We will, however, proceed to consider the arguments which have been used on behalf of the proposed reform.

Mr. Locke King states that the law which regulates the descent of real property "is a perfect chaos, inconsistent with itself, and generally admitted to be oppressive and unjust wherever it comes

into operation." We were not aware, until after we had had the advantage of reading Mr. Locke King's speech, that the present canons of descent were particularly chaotic and inconsistent; but confusion and inconsistency, if they exist, can be remedied without abolishing the present principle of descent; and the propriety of a change in that principle must depend solely upon the question whether it is unjust, oppressive, or inexpedient.

The rule of descent is thus laid down by Mr. Locke King:—"Where a parent dies intestate, leaving a widow and children, if his estate be freehold land the whole of it descends to the eldest son, and the remaining children and the widow are, under the sanction of the law, left destitute." As regards the widow the above statement is erroneous, for she is always entitled to her dower, of which she cannot be deprived, except with her own consent, or by her own election; or, as regards a widow married on or before the 1st January, 1834, by the usual uses in bar of dower; or, as regards a widow married since that date, by a disposition by, or the *express* declaration of, the husband.

Mr. Locke King mentions a case of peculiar cruelty to a widow, which had been brought under his notice:—"A small tradesman married a woman with some money; no settlement was made on the marriage; he would not invest her money in his business, lest it should run any risk of being lost. After they had lived very happily together for some years, the house they resided in was for sale; he told his wife that it would be a very good investment for her money, and accordingly he bought it. He died intestate, ignorant of the law; his own nephew, his heir-at-law, claimed and took the house, and the widow is now destitute—a menial servant."—(P. 10.)

The case, no doubt, is one of hardship; but there are also many other rules of law which, in particular cases, work great injustice. For instance, how often it has happened that the benevolent intentions of a testator have been frustrated because he was "ignorant of the law," and did not execute his will with the required formalities; and so his property has devolved upon his next of kin, whom he perhaps never saw, or who had no

claims upon him, in lieu of its coming into the hands of those for whom the testator properly intended it; and yet would Mr. Locke King and his supporters advocate a return to the old system, by which no formalities were required for the bequest of personalty, and would they extend this also to realty?

Again, the rule of law, that no gift by will in favour of a testator's illegitimate child can take effect unless the child be *in esse* at the time of making the will, and be particularly specified, is salutary as a general principle, but occasionally is extremely unjust. Take, for example, the following case, which is but one out of many:—A testator, who had married his deceased wife's sister, by his will gave all his property after her decease to his children, and died, leaving by her one son, who was born after the date of the will, but no other children. The son, in the eyes of the law, was illegitimate, and could take nothing; the property, subject to the reputed wife's life-interest, was held to belong to the testator's next of kin. The Master of the Rolls expressed his regret at being obliged to come to that decision, but could not decide otherwise (*Pratt v. Mathew*, 25 L. J., ch. 409). Now, could this case be brought forward in favour of a change in the law as regards the recognition by the state of illegitimate children?

The fact is, that it is impossible to legislate in such manner that no cases of hardship shall arise from ignorance of the law; and the general expediency of the laws of a country cannot be questioned on the ground that they are unjust and oppressive in a few exceptional cases.

But, to return to our widow. It must not be forgotten that the uses in bar of dower only bar the dower of the woman who was married on or before the 1st January, 1834; they do not affect the rights of any woman married since that day. It is true that many counsel as well as most attorneys have been in the habit of inserting, in *all* purchase deeds, a declaration barring dower; but this practice is utterly reprehensible, except where the insertion of the obnoxious clause is specially directed by the client. Surely, now that a man may at his own pleasure, by deed

or will, defeat his wife's dower, it is a great injustice to deprive her of it for the sake of the heir, who may perhaps be but a distant relation; and in most cases, if the matter were properly explained to the client, he would object altogether to the declaration in question. We were sorry to find Messrs. Davidson and Wright, in the first volume of their *Collection of Precedents* (p. 194), apparently countenancing this practice, by giving (without any warning to the unwary) the form of a declaration in bar of dower, as *the* form in all cases in which a purchaser is a bachelor, or a widower, or has married since the 1st January, 1834; but we were rejoiced to find that they subsequently repented them of the evil they had done, and inserted a note in their second volume (p. 193), to the effect that such a declaration is "unreasonable." The sooner they who "affect conveyancing" learn to regard this sound view of the soundest authority in English conveyancing, the better. Still the neglect in drawing—unjustifiable and mischievous in its effects as we admit it occasionally is—is not such a heavy grievance in the aggregate as to afford much aid to Mr. Locke King in his gallant fight for his cherished widows.

The case of the younger children is not so easily disposed of as that of the widow. The arguments put forward in the House of Commons on the 2d March last, by the opponents of the proposed "improvement," were neither cogent nor appropriate. The Solicitor-General, escaping from principle, entered into verbal criticisms in default perhaps of being able to introduce personalities, to be applauded by a party. He was informed, very properly, that his remarks would have been pertinent had the House been in committee on the bill, but, as that was not the case, that they were wholly beside the question. The parliamentary inexperience of the young Solicitor-General might have excused the irrelevance of his criticisms had they been fair and reasonable; but they were not so. The heavy demands, however, made upon his powers by the political exigencies of his party, on great occasions of life and death, may be pleaded as an extenuation for a slovenly

performance of his duties as law-officer, on an occasion of practical legislation like that we are alluding to.

The Solicitor-General set out by informing the House that a testator might have made a will devising his real property, and yet have died intestate with regard to his personal property; and that the effect of the bill would be this—there would be an administration under which his real estate would be distributed among his next of kin, in defiance of his will.

Now, no doubt the language of the bill would admit of this interpretation, but the difficulty could easily have been obviated by the insertion of two or three words; and it is an unfortunate confusion of principle and detail—of the essential and accidental—which frequently leads a certain class of minds to make such objections as the Solicitor-General here offered, instead of those which are true and substantial. Very few bills of the present (or any other) government would be accepted, if imperfect language and inappropriate phrase were held grounds for rejecting them. What (*e. g.*) would the Solicitor-General say if his real property measures had been objected to, because the bills he introduced were so obviously absurd that, within a fortnight after their introduction, he himself was compelled to alter, if not amend, more than half the clauses in them?

Another objection raised by the Solicitor-General was, that every real estate in the kingdom would pass to an administrator, and would be liable to be sold by the administrator for payment of the debts of the intestate. This must have been an error of forgetfulness, or arose from his confidence in the ignorance of the House; for only those estates of which a man might die intestate would vest in the administrator.

The Solicitor-General then proceeded to discuss the cases of hardship that would arise out of the bill. "Take the case," said he, "of a man possessing an estate which he had acquired by descent through his mother. Suppose he had one cousin upon his mother's side, and nineteen cousins upon his father's side, under this bill one-twentieth of that estate would go to the cousin on the mother's side, and the other nineteen-twentieths would go to

the cousins on the father's side." This, no doubt, is an unexceptionable proof of what all are aware of, viz :—that the statutes of distribution occasionally work unfairly ; and, had the Solicitor-General been advocating an amendment of these statutes, the case would have been in point *quantum valeat*. But, for our part, we can see no difference in this respect, whether the intestate inherited from his mother an estate, or a hundred thousand pounds in the three pounds per centum consolidated bank annuities.

"Take," continued the Solicitor-General, "the case of a large family estate descending to a married woman who had more sons than one. She had no power to devise ; and if this bill (which was said to be for the children) passed, that estate would be taken away from the sons and be given to the husband, who had a statutory right to administer to his wife's property."

We again say, compare with the above hard case another—namely, that of a hundred thousand pounds devolving upon a married woman without restriction. Would not the whole of this at once belong to the husband ? The Solicitor-General's second case, therefore, would be a strong one to cite (if, indeed, such cases are of any worth) in favour of an alteration in the law as regards the rights of the husband in the property of his wife ; but neither of the cases so fluently suggested by the eloquent law-officer of the crown, had any thing whatever to do with the *principle* involved in Mr. Locke King's bill. But, of course, these observations passed muster, and will be repeated probably whenever the question is again discussed, without hesitation by the one side, or exposure by the other.

The rest of the speech of the Solicitor-General contained no argument which will bear examination. Mr. Lowe truly said, "In the course of the Solicitor-General's lengthened remarks, he had not been able to gather up the question into a single point, nor to show any clear and decisive ground on which the bill should be resisted."

Nor were any of the other debaters much more successful. Sir George C. Lewis said :—"When a person made a settlement or a will, whatever provision he made for younger children out of his

real property was so much to their benefit, in addition to what the common law would give them ; and therefore, if a large portion was given to the eldest son, and smaller portions to the younger sons and daughters, no feeling of injustice arose, because the portions under the ordinary marriage settlement for the benefit of the younger children were so much in addition to what they would have by descent according to common law. They could have no reason for complaining of injustice or partiality on the part of their parents ; but, if this bill became law, that feeling would be entirely inverted. A person who made a marriage settlement, according to the present system of marriage settlements, would be robbing the younger children of the rights which the common law would give them. He would be accumulating upon the head of the eldest son property which was given to him, as it were, capriciously, arbitrarily, and unjustly, in addition to what he would derive in case of intestacy under the common law. Perhaps in our time no great practical change would arise out of that state of things. He durst say, the custom of making marriage settlements might be extended to another generation ; but he apprehended that the younger children would feel that they had been robbed of their rights, and that after a time the custom of distributing real estate among the children would obtain."

How is it, we would ask Sir G. C. Lewis, when a testator now leaves his real estate to be divided among all his children, and thus robs his eldest son of the rights which the common law gives him, that the eldest son is not heard to complain of injustice ? Ought not Sir George Lewis's argument to apply equally well either way ? Or is it that Sir George Lewis has a lurking feeling that injustice *is* really done to younger children when the eldest son takes the lion's share of the paternal estate ; but that it is proper, and for the benefit of the country, that all such feeling should be suppressed ? If this be the opinion of the landed gentry, then all we have to say is, that any system which is based on what its supporters feel, but dare not confess to be, injustice, must necessarily be a bad and sinful one, and ought not to be tolerated by members of a Christian community.

In England, the right (with certain limitations) of a living person to have a voice as to the channels in which property he possesses should flow after he is dead, is conceded. With the abstract and inherent right of a man having a word to say to the control of this world's goods when he himself is in another, we have nothing to do. The legal right, which is also in accordance with a very general sense of moral right, gives the owner a *post mortem* distributing power over property. Hence, if the landed gentry choose to endow their eldest sons with their estates, we can see no special unfairness in their so doing.

Practically speaking, the proposed modification would not in any way affect this class of persons. They would go on making their wills and settlements as heretofore. Are the great landowners of Kent, where equality of partition among sons is the rule of descent, found to dispose of their estates differently to the landowners of other counties?

As regards persons of the middle class, it cannot be disputed that they are generally in favour of an equality of division. The majority of the wills of persons of this class clearly shows this to be the case. But it would be by no means wise to hold out an inducement to them not to make wills, and this measure would operate as such an inducement. Intestacies among them are now not very frequent, and are becoming less so every day; but the measure in question would undoubtedly tend to increase their number. It is well recognised that a man, in disposing of his property by will in favour of his family, benefits them far more than he would do by suffering it to devolve upon them by intestacy; and it is now generally understood beyond the legal profession what the disadvantages of intestacy are; how, for example, the duties payable on taking out administration to the effects of an intestate are higher than those payable on the probate of a will; that a will is easily proved; that the appointed executor enters into no bond, and requires no sureties; whilst an administrator may be required to procure a surety, or more than one surety, to join with him in an administrative bond—a matter which is not always found to be quite so easy as at first sight

may appear. Then, again, the "Handy Book," or "handier attorney," will have explained to the "man of property," that the executor has, or *ought to have*, much greater powers of dealing with the estate of the testator in respect of the shares of minors, &c., than an administrator would have; and, generally, the disadvantages under which the family of an intestate labours, especially if there happen to be many young children, are so notoriously great, that the state ought to do every thing in its power to induce persons not to leave their property to devolve by intestacy. It is but idleness, carelessness, cowardice, or obstinacy, which induces persons to delay making their wills; and for these, who are a small minority, the state need hardly be required to legislate.

It is, then, the poorer class—the class of small landed proprietors—those who possess a small cottage and an acre or two of land a-piece, of whom it is said there are 300,000 in this country—that would alone be materially affected by this measure, for they seldom, if ever, execute wills. Mr. Locke King thinks these poor persons are seriously injured by the present system, and would be benefited by its modification. We not only doubt this; but we say, so far as experience and evidence are worth any thing on a speculative proposition like this, that the reverse is the truth, and the class in question would inevitably suffer. But the lawyer and the government would frequently be benefited, at the expense and sometimes ruin of the client.

In the first place, in every case an administration would be necessary where now none is required. The yeoman, with his attorney, must go to one of Sir Richard Bethell's district registries, and there take out administration to the estate of the intestate, who probably may have left nothing in the world but his cottage and patch of land; a surety or not may be required at the option of the district registrar, and the yeoman may or may not come prepared with, or be able to provide, such an article.

But the obtaining of the letters of administration would be but a light and easy matter, as compared with the troubles and liabilities which the unfortunate administrator would incur in dealing with the little property vested in him. Would Mr. Locke King

have the cottage pulled down and the bricks divided, and the land parcelled out into little strips and thin slices? Probably not. Well, then, supposing all the next of kin are capable and willing to concur in some arrangement, there are but three courses open to the administrator:—(1) the property can be sold; or (2) one or more of the next of kin can take the land and pay out the rest; or (3) it may be let.

In the first case, the expenses of the sale, together with those of administration, would leave but little to be divided. The widow, for whom Mr. Locke King so urgently pleads, would be turned out of the house in which she may have resided during all her wedded life, and each of the next of kin of the intestate would become possessed of a small sum of money, the greater part of which would in many cases be frittered away, and sometimes, we fear, pass by a very ready-money transaction into the hands of the nearest publican.

In the second case, money must be raised. How can this be done but by mortgage? Here, again, step in the processes of the law, its costs, and outgoings. A deed of mortgage must be prepared, as also a conveyance to those of the next of kin who elect to take the land, and perhaps a release to the administrator, who would not be safe without it, at least so says the legal adviser. The expenses incident to these proceedings must either be shared by all the next of kin, or—which would amount to the same thing—must be taken into account in the valuation of the property, and be raised by the mortgage. These expenses would at least equal those which would have been incurred had a sale been determined on; and the few pounds which law and the lawyers would leave, would soon slip through the fingers of those who are paid out without bringing commensurate advantage to them; while those who keep the land would be hampered with a heavy mortgage—heavier, perhaps, than the property can bear. In a bad year interest would fall in arrear—the land would be sold, and one of the valuable body of ancient freeholders be thus struck off.

In the cases we have mentioned, the attorney, however mode-

rate, and necessarily ill-paid in the business, would be the nearest of kin to every intestate; for it is he who would take the largest share of the property, the value of which, be it remembered, must be reckoned not by thousands, but *at most* by a few hundreds of pounds.

We have yet the case of a lease to consider. This would be the least objectionable mode of dealing with the small property; the expenses would not be so heavy as the expenses in either of the other cases, and each of the next of kin might, perhaps, receive two or three pounds a-year. But would this be so considerable an advantage to them as to induce the legislature to change a law which, after all, has worked pretty well for eight hundred years? And although all the next of kin may agree to a lease in the first instance, yet what is to prevent any of them, including the husbands of daughters, from subsequently insisting upon a sale?

In the event of any of the next of kin being incapable or unwilling to concur in these arrangements, the property must either be sold by the administrator, or recourse may be had to the Court of Chancery! The bill makes special provision for such a state of affairs; for by its second section the Court of Chancery is authorized to give such directions, upon the summary application of the administrator, or of any of the parties entitled, as the court shall think expedient. Mr. Henley, in his observations on this bill, remarked that he did not think it was necessary to enact that any man might go into the Court of Chancery, because he always laboured, unfortunately, under the impression that the Court of Chancery, like another nameless place, was always open. Be this as it may, the Court of Chancery is not exactly the court one would wish to see imposed upon the poor; and yet if this bill had passed it would have been almost impossible for them to avoid resorting to it.

The law as it now stands does not operate with any degree of hardship upon the poor. The widow, we may say, is invariably provided for by her dower; and though instances may be found of a harsh elder brother, who may refuse countenance to the younger

branches of the family, yet these are the exceptions among the poor, whatever may be the case among the richer members of the community. The good old English heart is not yet extinct, and the cottage which, under the proposed system, would in nine cases out of ten, come into the hands of the stranger, is still open to the young brother or sister in the case of need.

In the view which we take of this question, the peculiarity of the law as regards leaseholds cannot be considered; it is an anomaly we admit, but there is very little long leasehold property held by the poor; that species of property is chiefly found in towns, and the poor are seldom owners of house property in such localities. There are, we are aware, a few districts in England, principally in the north and on the seashore, in which land is occasionally sold in small plots, by way of lease for 1000 years, at peppercorn rents, the object being to reserve certain rights which could not be reserved in any other manner; but these cases are not numerous, and the plots are usually purchased for building purposes, and are, therefore, not in the hands of the poor.

Mr. Locke King has said, that among the middle classes there is scarcely one in a hundred who knows the law; they imagine that land descends as money does. This we take leave to doubt. If one thing in law is popularly, nay universally, known, it is that the eldest son is heir to land. But were it to be as Mr. Locke King thinks, we again say the middle classes can and do take care of themselves and their families far better than the poor can. The small landowners, "who never do and never will make wills," inherit by descent, and *they* know the law well. Lord Palmerston mentioned the case of a yeoman living on the borders of the New Forest, who possessed a cottage and a few acres of land, which he had inherited from an ancestor who carried the body of Rufus to Winchester; and that that yeoman was as proud of his position as the greatest peer or landowner in the kingdom. This yeoman, and all who, like him, have inherited as eldest sons, must be perfectly well acquainted with the rule of descent.

Mr. Locke King, in support of his bill, quotes the following passage from the renowned speech delivered by Mr. Brougham in the House of Commons, on the 7th February, 1828, in which the

whole state of the common law of the country was brought before the House. "Is it fitting or consistent with reason, or indeed with justice," said Mr. Brougham, "that merely crossing the river, or travelling a distance of some miles in this neighbourhood, should make so great an alteration in the law of real property, as that, to the eastward of us, all the sons inherit equally; to the westward, the youngest alone; and here, the eldest? But these rules of the Common Law, of Gavelkind, and Borough-English, are better known, and operate within more defined limits. What shall be said of the customary tenures in a thousand manors, all different from the common law that regulates freehold estates, most of them differing from each other? Is it, I ask, fit that this multitude of laws, this variety of codes—the relics of a barbarous age—should be allowed to exist in a country subject to the same general bonds of government?"—*Lord Brougham's Speeches*, v. 2.

Never was a passage more singularly misapplied than this one has been by Mr. Locke King. Mr. Brougham adverted to "the inconvenient differences in the tenures by which property is held, and the rules by which it is conveyed and transmitted in various districts" (p. 378); and went on to say, that the obvious remedy to be adopted in this case was to give to all parts of the country the same rules touching property, and therefore he would propose an assimilation of the laws affecting real estates all over England (p. 382).

Mr. Brougham's opinion is strongly in favour of the abolition of peculiar tenures and customs, the inconvenience of some of which were pointed out in a late number of this Magazine;¹ but surely Lord Brougham must have been somewhat astonished at finding a passage, in a speech of Mr. Brougham, quoted in support of the abolition of the "right of primogeniture!" Lord St. Leonards' "Handy Book"—(which, by the way, is curiously stated by Mr. Locke King to have been published some years ago by the learned lord when Sir Edward Sugden!)—is next quoted in support of the bill. The passage is as follows:—

"A moment's reflection will show what serious consequences may follow from a neglect on your part; for suppose you purchase

¹ See an article on Gavelkind, L. M. & R., vol. vi., p. 333. (Feb. 1859.)

an estate with the £10,000 in the funds, which you have given by your will to your younger children, and which constituted the bulk of your personal property, and should neglect to devise the estate, the money must go to pay for it, at the expense of your younger children, who would be left nearly destitute; whilst your eldest son, to whom the estate would descend, would have an overgrown fortune."

Now this case ought to have been provided for by the act (17 & 18 Vict., c. 113) already alluded to. It was supposed by some that the act would apply to it, and that a lien for unpaid purchase-money was a charge within the meaning of the act; but V. C. Stuart has held to the contrary (*Hood v. Hood*, 26 L. J., ch. 616). Mr. Locke King would do well to amend his act in this particular; but the case has nothing whatever to do with the present canons of descent.

We have shown that these canons do not work injustice on the higher and middle classes, and that the proposed change would be injurious to the lower classes. None of the arguments in favour of that change can bear strict investigation; for though at first sight they seem to be plausible, yet, upon mature consideration, they prove to be unsatisfactory and inconclusive.

The reforms usually advocated by Mr. Locke King are such as most sensible men would be glad to see well considered if not carried out. It is he who, by his repeated attacks, has forced successive governments to entertain and bring forward measures which, otherwise, would long have lain dormant. It is he who has continually urged the necessity of a reform of our statute law, and it is not his fault that none of his efforts in that direction have succeeded; and it is he, moreover, to whom reformers are indebted for the introduction, by government, of political reforms, to which a passing allusion only is permissible in our pages. In fact, Mr. Locke King has "done the state some service;" but his last proposed reform is one of that large spreading class of "over-busy meddlings" alluded to at the outset of this article, and which my Lord Chief-Justice Hale doth quaintly but with good reason condemn, and against which it is our duty, in this publication, strenuously to protest.

ART. VI.—THE LIBRARY OF THE MIDDLE TEMPLE.

PASSENGERS on the river Thames will doubtless be struck by the appearance of a new stone building now erecting on its northern bank, not far from the Essex-street pier. The building is destined to be the new library of the Honourable Society of the Middle Temple; and, when completed, will doubtless, notwithstanding some unavoidable inconveniences in site, be one of the lions of the Temple, if not of the metropolis.

But it is not of this edifice, but of the valuable collection of books, which, having outgrown its present receptacle, it is intended to place there, that we are about to give a brief account.

The portrait of the founder of the Middle Temple Library hangs in the reading-room, but in so unfortunate a light, that the apartment might be entered a hundred times by the same person without the picture, which apparently needs cleaning, attracting attention. It represents a dark-haired, thin-visaged man, and (if the portrait be life-sized) of somewhat small stature. The artist's name is invisible, and, we believe, unknown.

This gentleman—Robert Ashley, Esq., an ancient member of the Honourable Society—dying in 1641, left his whole library, together with a large sum of money, to the Inn in which he had imbibed his legal education. This liberal example was promptly followed by several masters of the bench, and other distinguished Templars of the day; and the library of the Middle Temple was thus established.

It is difficult, in these tranquil times, for the imagination to figure the sensations of residents in the Temple in 1642—that most eventful epoch in England's history—and during the subsequent years of war and tumult. Within the recollection of the present generation, however, there did occur an extraordinary scene of excitement in the quiet regions of the Temple. We refer to the memorable 10th of April, 1848, when special pleaders became special constables—sergeants-at-law undertook the duty of

sergeants of police—briefs were forsaken for batons—and pupils ceased to ponder on the principles of Magna Charta, that they might rush forth to destroy the multitudinous Chartists.

We are assured by the solitary Swiss who guarded the Middle Temple Library on that remarkable occasion, that after the truncheoned battalions of Templars had been marched to their respective posts, and he was left "alone in his glory," he felt somewhat lonely and "hunkit," as country people say. For, although prepared to die, if need were, at his post, as became a man and a servant of the Honourable Society, yet death under such circumstances is much more heroic in act than agreeable in contemplation. Doubtless he would rather have figured amongst the Beaumanoirs and Bois-Guilberts whom he had seen pass from the gates, with hearts and sticks of oak, to anticipated combat; gallant brethren of his own, he knew, too, were amongst the Conservative bands. And thus his mind would involuntarily, assuming a comparative mood, revert to the fate of the faithful few defenders of the Tuileries, who perished one against a host. They had the bayonet—he his books. But valuable support as is each of these weapons to constitutions under ordinary circumstances, even they will sometimes fail in crises, and he might perish surrounded by Blackstone and Coke, and might meet death at the hands of an illegal mob, whilst in his own he held a copy of Broom's legal maxima. That was only the danger of a day. But in the reign of the first Charles the library and its inmates were exposed for years to continual perils. Cavaliers or Roundheads, in present want of cartridges, might equally be expected to make free with the collection, and military as well as mob caprice might have spared us the agreeable labour of writing this article!

These troublous times have left their traces in the library, in a very ample collection of proclamations, manifestoes, ordinances, letters (the only then existing representative of the present newspaper), speeches, and pamphlets, emanating alike from king and parliament.

Although passing through this fiery period unscathed, the

library does not appear to have been materially increased until after the close of the civil wars. When it ceased to be entirely supported by voluntary contributions we know not; but the next benefactor upon a large scale was the Irish Lord Chief-Justice Pepys; and, in the succeeding two hundred years, the names (amongst others more or less well known) of Elias Ashmole, Bartholomew Shower, and William Petyt, may be found amongst its most liberal supporters. Yet, as we shall see presently, it has undergone several periods of strange, and, to us, unaccountable neglect, the effects of which were, till lately, very discernible in its weakness upon particular important subjects, and are not even yet entirely eradicated. For example—a complete series of the old reports was not to be obtained in it till late in the present century. That defect, however, is now supplied.

Sir Cresswell Levinz is stated,¹ upon the authority of a MS. in the Harleian Collection, to have printed a very few copies of a catalogue of this library. We have been unable to discover any trace of it. The earliest extant that we know of, and which, we believe, to be also very scarce (only one copy existing in the library), was made by, or under the direction of, Sir Bartholomew Shower, then treasurer of the society, in 1700. It is classed with considerable minuteness, according to language, subject, and size; but in some other respects the arrangement is faulty, and the type is small.

We have already stated that at several periods the library has experienced much neglect, not easily to be accounted for, until some new *impetus* was given to its augmentation by public-spirited friends, or members of the Inn. But never has this neglect been so visible as during the long space of time from 1711 to 1826, during which few works appear to have been added to the collection, either by presentation or purchase. What were the guardians of the library about all that time?

“ We know not, and it ne’er was known.”

Nevertheless, a new quarto catalogue, in good type, with large

¹ *Gentlemen's Magazine*, September, 1816.

margin, was printed in 1734, in the treasurer'ship and under the superintendence of Mr. Charles Worsley, a gentleman who appears to have bestowed much pains and attention upon all matters connected with the society. This catalogue has the merit of containing a full account of the very numerous collection of tracts and pamphlets then belonging to the library, and references were for the first time made to the place of books upon the shelves; nevertheless, it must have been a matter of time and difficulty to find a great number of works from Master Worsley's catalogue. For instance—premising that in this library six, eight, or sometimes even ten works, upon divers subjects, are often bound up together—observe this specimen from the catalogue of 1734:—

- Stephani (Hen.) *Juris Civilis Fontes et Rivi.* 8vo, 1580.
 Hier. Eleni *Diatriba ad Jus Civile*, 8vo. Ant., 1576.
 Jac. Lectii *Oratio de Vita et Scriptis Æm. Popiliani*,
 8vo. Gen., 1594.
 ——— *De Studiis Liberis, publica ob mala non dese-*
rendis, 8vo. Gen., 1594.
 Commonefactio *de Jure-consulti fine, et in Dissidiis*
dogmatum Ecclesiæ Officio, 8vo. Neo., 1590.
 Cl. Baduelli *de Ratione Vitæ Studiosæ ac Literatæ*
in Matrimonio collocandæ et degendæ, 8vo. Lips.,
 1581.

All the above works being comprised in one volume, and no separate reference existing in the catalogue to Elenus, Lectius, or Baduellus, their lucubrations, as well as some others of more value, similarly circumstanced, might be almost considered as lost in the library.

This catalogue abounds in clerical or typographical errors—in most cases probably the former; for there is curious internal evidence of the employment of a Cockney amanuensis. In all works emanating from *Lugdunum*, abridged *Lugd.*, the penman has reversed the letters, and written *Ludg.* He could not get *Ludgate* out of his head!

The next and last catalogue was printed in 1845, and, unlike Master Worsley's, is a good *finding* catalogue—the most important point in such compilations. It consists of classes, and an index; but the former, although approved by earlier masters of

the library, have been found of little practical utility, the index having been almost always referred to in preference by readers. Indeed, classes, whether minutely subdivided or not, are seldom found to answer in a large library; and we hope that, as the collection has been already greatly augmented since 1845, the bench will shortly sanction the printing of a new catalogue, alphabetical, but with copious references to *subjects*, and upon an approved and well-considered plan.

In 1738 the library numbered 3982 volumes.¹ At present there are between 15,000 and 16,000, and this increase has chiefly been made within the last twenty-two years. The late Lord Stowell's munificent benefaction about that time was, we believe, entirely applied to the purchase of books upon civil, canon, and international law, chiefly selected by a gentleman well known for his works upon those and kindred subjects, and who has since been one of the readers on legal science. Hence the library suddenly acquired a strength upon these points somewhat disproportioned to its weakness upon others, and efforts have been gradually making of late years to supply these deficiencies.

Yet, if few books were added to the library in the dark period between 1711 and 1826, very many were unfortunately lost, and especially some of the most scarce and valuable tracts of which the collection could boast. During this period flourished, amongst many other eminent men, students of the society, Yorke,² Blackstone, and the brothers Scott. We know not whether the keen eyes of the commentator, or the beetle brows of Eldon, were ever actually bent over any of the volumes now forming the Society's collection; but if, as is most probable, they did actually use the library, we think they must have anathematized the carelessness which then seems to have pervaded every department connected therewith. At the fate of the missing volumes, or the degree of those who profited by their prolonged, and unfortunately perpetual absence, from the shelves, it is in vain to guess. The

¹ Gentleman's Magazine, October, 1798.

² Lord Hardwicke.

majority of the lost books being of moderate dimensions, their abstraction would (where care was not) be a matter of comparative ease; but how are we to account for the disappearance of *thirty folio volumes* of Votes of Parliament?

The Middle Temple has been rich in its list of distinguished men—in men exalted not merely in station, but in intellect. This will scarcely be disputed when we remember that amongst lesser, though still brilliant luminaries, and a host of judges and other sages “learned in the law,” Raleigh and Burke have both been borne upon its books. So have Clarendon and Somers; so has Sir Thomas Smith; so have those successful candidates for other than legal glories—Rowe, Congreve, Southern, Sheridan, and Moore; and so, more recently, has Havelock, the general, the historian, and the missionary. And the Inn still numbers many persons eminent in literature or in the political world, as well as in legal acquirements.

But of the great men passed away, several were only nominally students; and of the rest (of those at least who flourished during the greater part of the last century) it may be doubted whether they derived much benefit or inspiration, legal or otherwise, from the library. Certain at least it is, that they have left no undeniable trace of their studious life behind them. No manuscript, emanating from any of the distinguished persons we have named, graces the shelves or lockers of the Middle Temple. The searcher for autographs will seek them there in vain; for although many of the older volumes contain copious marginal notes, they appear to have existed previously to the presentation or purchase of the volumes for the use of the Society. At present, and for a long time past, readers have very properly been forbidden “to write in any book” whatever; and truly, the few instances in which this prohibition has been disregarded, tend but to show the necessity for the rule. But, whatever may be the case with the books, that the present *building* has never been frequented by the giants of past times is, of course, absolutely certain. The former question, relating to what *may* have been, is however an interesting subject of speculation; and we may refer to what *must* have been—

the pacing of the court and thronging of the hall, at least, of this ancient Inn, by the worthies of bygone ages. What a variety of costume and manner must its precincts have witnessed, even since its becoming a place of legal education ! Possibly the memorable cloak, which became a foot-cloth for the "Virgin Queen"—more probably its prototype—may have figured within its boundaries ; and after an endless variety of fashion in wigs, and cut of coat and beard, the costume of many of its members seems at present to approximate, the hose excepted, to that of Elizabethan times.

Altogether, the library of the Middle Temple may be safely pronounced a fine, though, for the reasons already given, a somewhat anomalous collection ; containing undoubtedly some rubbish amongst its heaps of literary gold. We have sometimes heard it complained of as not being a perfect library ; but this is unreasonable, for—

Who hopes a perfect library to see,
Seeks what nor is, nor was, nor e'er shall be.

Such a "faultless monster" is certainly *not* that of the British Museum ; for, although that vast storehouse of literature is maintained by coercive measures, as well as by purchase and voluntary contributions, we have frequently inquired in it for works, not always of foreign publication, or of a very recondite character, or very scarce in number, and have not discovered them. We say this not as reflecting in the remotest degree upon the librarian or trustees of the museum, but simply to show that imperfection in libraries is a part of their very nature. Indeed, unless all new publications were suppressed, or confined to one country, this could not be otherwise. Moreover, the funds of the honourable society, though great, are not, we presume, inexhaustible. And their library, in its first foundation, appears to have approached perfection for the time. With a very few exceptions, to be mentioned presently, no branch of knowledge seems to have been altogether overlooked. There are very few showy books in the Middle Temple Library. What the late Mr. Lockhart calls "the toy-shop of literature," has no place here. Sumptuous

bindings, too, have been judiciously and judicially held unnecessary. The books

“Are but *volumes* for the working day,
Their gayness and their gilt are all besmirch'd ”

with “painful” and frequent handling, and a long endurance of the smoky atmosphere of the heart of the metropolis.

But if the binding be generally plain in one sense, it is, or till lately was, not always so in another. Some of the backs of the thousands of old books rebound, displayed eccentricities of lettering singular for their intrepid defiance of meaning. We some years ago found a volume, lettered “*Idem Liber!*” What could this denote? We at length discovered that it was the duplicate of another work in the library, and marked in the “Worsley Catalogue” as above; and the person intrusted with preparing books for binding, during the dark period already referred to, had taken this for the veritable title of the publication in question. Other instances, scarcely less ridiculous, we could give. Grammatical inaccuracies, such as “*Sennerti de Chymicorum,*” abound, and seem to have been held of no importance.

We will now request our readers’ attention to separate classes of works composing the collection, with reference to their comparative strength and weakness.

The manuscripts in the Middle Temple library are very few; and of those few, the subjects of several are to be found in print, and some appear to be merely copies of books already published.

The reports of cases before Lord Nottingham are supposed to be the most valuable possession, in this way, of which the library can boast. These it was once in contemplation to publish, and, indeed, they were actually placed for that purpose in the hands of a gentleman, who would doubtless have ably discharged the task; but, for what reason we know not, the design was ultimately abandoned.

Another volume of Reports—Maynard’s—in the time of the two Charles’s, appears to be less authentic. Then there are the voluminous pleadings of the late Godfrey Sykes, an old member.

of the Society, and a most worthy man, whom we well knew. Several of his pupils attained high professional honours.

There is also a very large collection of manuscripts by the late Mr. Fearne, numbering no less than fifty volumes, of various dimensions. It is probable that, amongst such copious relics of so distinguished a lawyer, a skilful eye and hand might detect and select valuable professional gems; but, at present, they are altogether without arrangement, and therefore, it is to be presumed, of little practical use.

Of printed books upon English law, the reports are probably as complete as in any other collection; but, until lately, the library was somewhat weak in *modern* text-books and treatises, although it has been gradually much augmented in this department. Till within the last twenty years, there was what *we* must consider an illiberal standing-order against the purchase by the Society of any legal periodicals. They are now, however, duly supplied. It may, however, be observed, that much difference of opinion will always exist amongst readers as to what a library ought to contain, upon this as well as other subjects; but as this article is designed to be descriptive, and not suggestive or didactic, we refrain from expressing the thoughts which we, in common with others, may entertain upon the question.

The collection of Scotch and Irish Reports is, we believe, complete; and there is a fair collection of text-books relating to professional matters in these sister kingdoms. Of American reports, and other legal works, there is also a tolerably strong force, principally due to the care and liberality of a barrister of the Society, to whom we have already alluded.

In civil, canon, and international law, the library is very strong. Nevertheless, there are many works of continental celebrity upon these subjects which, as yet, it does not include.

The class of books of divinity and ecclesiastical history is very large, occupying no less than 190 pages in a catalogue containing 656. It should, however, be remembered, that the title of a very brief tract (and of such this portion of the library in a great measure consists) may occupy as much space as that of an elaborate work comprising an indefinite number of folios.

By far the greater part of this valuable collection (much of which might be coveted by Sion College) dates from the foundation of the library, few additions having been made to it of late years; the exceptions being works of some of our old standard divines, few of which appeared previously, amidst a crowd of theological writings comparatively unknown, yet many of which might have been useful weapons in the recent ecclesiastico-legal disputes, when Tractarians and anti-Tractarians contended as fiercely as did the Jesuits and anti-Jesuits in earlier days, of which the monuments exist plentifully here in many a closely-printed tome, and still more abundantly in briefer tracts and pamphlets, with "conceited" titles. For in this, as in other sections of the library, works there are not a few, anonymous, or by illustrious authors little known, but often interesting to those who, like ourselves, are sometimes inclined for "such reading as was never read." "The Doleful Knell of Thomas Bell" (a Protestant); "A Currycomb for a Coxcomb," and Hercynianus' "Rhabarbarum Domandæ bili Camerarii"—are specimens of the delight of some of our ancestors in this description of wit.

The oldest English Bible in the collection, is the Cambridge edition of 1660; but the Holy Scriptures are to be found entirely, or in part, in about fifty different languages, some of them rarely studied in this country.

There is no complete collection of the Fathers of the church, but ecclesiastical writers of the sixteenth and seventeenth centuries abound. The missionary letters of the Jesuits are to be found in considerable numbers.

Amongst the few English writers on Divinity of a more recent date, added to the library before 1826, may be mentioned Professor John Hey, of whose work a mutilated copy (one volume out of four being missing), whether by purchase or presentation is unknown, is to be found on the shelves. This writer, much less celebrated than he deserves to be, is invaluable to students of the articles of the Church of England. His work, which has received, amongst those of other able persons, the warm praise of Dr. Arnold and the late Bishop of Lincoln (Kaye)—very different

men—is clear, forcible, and attractive ; and is not to be met with in many important libraries.

The Middle Temple Library contains several choice and curious works on Witchcraft and Demonology, tending to show that our ancestors were nearly as foolish and credulous as (not more so than) ourselves. The chief of these in the vernacular are Scott's "Discovery of Witchcraft," Cotta's "Trial of Witchcraft," and Deacon and Walker's "Discourse of Spirits and Devils." Several others have been abstracted.

The library is altogether tolerably strong in English history, with its adjuncts and concomitants in the shape of pamphlets and treatises. But this branch of knowledge—after law proper, probably the most important in an English legal library—formed no exception to the general rule of neglect, affecting the Middle Temple collection, during so long a period. Amongst the many quaint old tracts with quainter titles which this class includes, such as "Worthies and Unworthies of the Age described," "Grievous Groans for the Poor," &c., one entitled, "Some Wiser than Some," a most undeniable proposition, recurs to us as applicable to the judgment and public spirit which especially influenced the late Lord Colchester and Mr. Robert Casberd (who were chiefly instrumental in the resuscitation of the library), as contrasted with the strange apathy upon this subject, which appears to have characterized many of their predecessors of the bench.

Amongst memoirs connected with English History, we have here some which are scarce as well as curious. "Robert Monro's Expedition with the Scotch regiment called Mackay's" (fol. 1637), is known to have furnished large draughts of inspiration to Sir Walter Scott, before introducing to the world his "Dugald Dalgetty." Thomas Carve's "Itinerarium in Legione Colonelli Devereux" (8vo, Mog. 1639), a somewhat similar work, is also not every where to be met with.

The Society possesses, though not a complete, yet a very voluminous, collection of chronicles of English (and other) history, from that of Geoffrey of Monmouth, to a very unique and interesting "Chapter from Froissart," recording events of a somewhat

later period. The important series now in course of publication, under the direction of the Master of the Rolls, promises ere long to form a library of moderate dimensions in itself.

Intimately connected with this subject are the debates, journals, and other publications relating to the two Houses of Parliament. The two first sections of these are complete, and memoirs and treatises are also to be found in considerable number. Many hundred volumes of Reports of Commissions (the formidable blue books, always called for, little read), were about twenty-two years since presented to the Society. It is fortunate at present that the gift was not repeated; for, assuredly, the present receptacle for its books would not contain such another cargo of these folios. A judicious selection, when space shall have been provided for them, might not be found unserviceable.

It was not to be expected that the collection of historical works relating to other lands should have rivalled in number those which treat of this our England; nevertheless, in the earlier stages of the library, they (taking the word collectively) did, in fact, outnumber them. It is true that a disposition to narrate events appears to have always existed on the continent of Europe in a greater degree than in our island. At the present day the historical and memoir writers of France are more numerous than our own. This department of the library has not been greatly increased of late.

It includes, amongst other curiosities, a brief, and we believe scarce work, by Robert Ashley, evidently the founder of the library—"Almansor, the learned and victorious king that conquered Spain: his Life and Death"—bearing the date 1627, and dedicated to Charles I. Although not the only publication of Mr. Ashley, this is the sole one which the library which he originated now contains, for an account by him of Cochin-China has long been missing. He was a gentleman of Wiltshire, born in 1565, and therefore above seventy-six years old at his death. Mr. Ashley appears, by his dedication, to have had a far higher opinion of King James I. than we have; but had his son and successor well weighed the contents of the third chapter of this little work,

"of the manner observed by the King Jacob Almansor in administering justice," the writer might have had the credit of saving his sovereign's head, as well as of enlightening those of succeeding generations of Templars.

The "History of the Western Empire, from Charlemagne to Charles V.," by the late Sir Robert Buckley Comyn, formerly master of the library, is valuable as a judicious epitome of events during that long period.

With respect to Geography and Topography, including Voyages and Travels, the old library was strong, but its strength has been little increased of late years. There is, however, an exception to both these rules. In English county and local history a remarkable deficiency existed until very recently, when very great improvements were made; and we have reason to believe that it is in contemplation to place the library in a still more powerful position as regards this very important branch of knowledge.

Whilst upon this subject, some mention of the two very curious and ancient Globes placed in the reading-room should not be omitted. They were published by William Sandersen, a merchant of London, and made by Emery Mollineux, "a man well qualified, of a good judgment, and very expert in many excellent practices," under the direction of John Davis, the celebrated navigator, who has given name to Davis' Straits, and whose discoveries were marked upon the terrestrial globe under his own immediate inspection. The date of the celestial globe still continues 1592, but that of the other has been visibly altered to 1603 with a pen.

In Biography there is much that is old and curious, and many recent additions have been made; still, however, leaving much room for judicious augmentation.

Few scientific works of any description have been added to the many originally provided by the founders of the library, nor is the demand for these, in general, very great. Of encyclopedias there are several, and these supply tolerably well modern deficiencies. But, as the theological books belonging to the Middle Temple might have suited Sion College, so might those on medicine and

surgery have been well adapted to form part of the treasure of the Royal College of Surgeons.

It must be remembered that, in the time of Mr. Ashley, astrology and alchymy were looked upon as veritable sciences, and respected accordingly even by true philosophers. The library evinces this by many a curious tome upon these subjects, since abandoned for the pursuit of other follies; and, although metaphysics and logic cannot be classed with follies, can it be truly said that they are, often and altogether, studies of much greater real utility? Several dusty treatises are to be found here relating to the mysterious brotherhood of the Rosy Cross.

"As Rosicrucian virtuosos
Could see with ears, and hear with noses,"

they could probably have transferred the sense of smelling to the eyes, a faculty which would have proved especially enviable in the early part of last summer, when the simple closure of those precious organs might thus have shut out the unutterably offensive breezes from Father Thames, which then rendered a visit to the Middle Temple Library scarcely endurable for any length of time, and of which there is much reason to dread the recurrence.

In works on the Fine Arts the nation has made enormous strides since the seventeenth century; still these were not forgotten in the original formation of the library, and they would yet be interesting, if not instructive, whether to the architect, the sculptor, the painter, or the musician; by far the greater part of them are in foreign languages. Neither was the physical education of templars yet unborn neglected by Mr. Ashley, and other benefactors of 1641. Judiciously was it remembered, for it is a subject of great importance; and, accordingly, the treatises on horsemanship, swordmanship, and other exercises, are not amongst the least curious treasures of the library, although several which should be there have been long since carried off. One upon the last-named art, "*Libro de las Grandezas de la Espada*," is in manuscript, and very probably in the founder's hand, as he is known to have visited Spain, but the original appears to have existed in print.

The Middle Temple is more than indifferently well-provided with Dictionaries and Glossaries, and among these are many explanatory of the language current in divers English counties; an exceedingly valuable addition to a legal library, as we have known words, supposed to be technical, after a long and vain search through many a law lexicon, discovered to be merely provincialisms.

Until lately there were few *good* editions of Greek and Latin Classics, but, *en revanche*, a considerable number of miscellaneous works, in various languages, comprising a Chinese novel, and, among others, a numerous assemblage of Spanish romances, forming, in all probability, part of Mr. Ashley's collection, together with many an eccentric treatise or dialogue, *Alphabet de l'Imperfection des Femmes*, *Dispute d'un Asne contre Frère Anselme Turmeda*, &c., &c.

English poetry till recently was almost a nonentity here. We believe no edition of Shakespeare or Milton was to be discovered in the library forty years ago. Neither were the classic English prose writers in very great strength, and even now many additions, as regards these, might be advantageously made to the stock of the society. It should rather appear that Mr. Ashley preferred modern (1641) and foreign, to English or ancient literature. Of late years, law lists and other annual books of reference have been suffered to lie on the table in tolerable abundance, prior to which period these convenient instructors were not to be obtained here.

A treatise *De Gestis Majorum Trium Regum*, printed in 1477, is supposed to be the oldest work in the Middle Temple library; but several others approach it in antiquity. It is curious to observe how nearly the hopes and fears of former generations are represented by those of our own, and could we recover the stolen tract of 1599,—“Richard Crampton's Mansion of Magnanimity; or, the Strength of England to Withstand a Foreign Invasion;” or, “A Baker of Boulogne's Letter sent to the Pope” (1607), we should perhaps find as close a resemblance to the views of some of our modern speculators on national defences and the see of Rome,

as some difference of circumstances, affecting both subjects, would permit.

We have, thus far, seldom departed from our expressed intention of confining our article to a statement of what is, and has been, in the library of the Middle Temple, and of avoiding the utterance of suggestions of what should be the course of the honourable Society hereafter. In one particular, however, we venture again to depart (if we have already departed) from this our resolution, and to make an exception in favour of all books ordered to be read by the council of legal education, which should perhaps include all those selected for special reference by the readers on law respectively. These, we cannot but think, should be considered as an essential portion of the library; and ordered, as a matter of course, on every decree of the council, whilst the present system of professional education continues.

In other respects, although our opinions, as to what the composition and regulations of the library should be, have been long and reflectively formed, we forbear to express them, and close for the present our labours, wishing prosperity to the ancient collection of the honourable Society, in the new abode so rapidly preparing for it; and which, if we enter, we shall carry with us divers conflicting recollections—some sunny, some cloudy, some pleasant, others the reverse—of the older building, which, like the castle of Macbeth, “hath a pleasant seat,” and which, we hope, will be so tenanted, as not to be degraded from its present position of importance among the edifices of the Inn.

ART. VII.—PRINCIPLES AND LAW OF BANKING.

The Logic of Banking: a Familiar Exposition of the Principles of Reasoning, and their Application to the Art and Science of Banking. By J. W. GILBART, F.R.S., &c., &c. London: 1859.

THE title of this book is eminently unfortunate. The work itself contains much that is highly valuable; but all the connection that it has with logic, consists in a partial application of syllogistic forms to a few of the principal questions that ordinarily come before bankers for consideration in the conduct of their business. To men who are accustomed to observe, and compare, and draw inferences, this portion of the treatise will, we fear, prove little better than useless; while to those who are not in the habit of reasoning, it will assuredly fail to communicate the art, even in its rudiments. What Mr. Gilbert has in fact chosen, under this fantastic and unattractive appellation, to lay before the public, is a highly valuable repository of principles and maxims for the management of banking business—principles resting, for the most part, on sound reasonings and great knowledge of political economy—maxims professedly derived from large and varied experience, and tested by reference to the opinions of the highest living authorities. As a hand-book of practical banking, adapted for daily use and consultation by persons engaged in that pursuit, who, apart from considerations of a legal nature, look for guidance as to the safest mode of deriving profit from the occupation, leaving questions of law to be dealt with by their professional advisers, there is in print, we apprehend, no work that, for soundness and perspicuity, can pretend to range with this. In a remarkably small compass, much information, and many valuable results of personal experience and long devotion to the subject, are comprised.

We gladly lay hold of the occasion to offer some remarks on the subject of banking, in such a form as seems best adapted to

be acceptable to the class of readers for whom we principally write. Since 1844 the practice of "keeping a banker" has grown so rapidly, is now established so widely, the sums deposited have become in the aggregate so enormous, and the variety and importance of the questions relative to banking, which now so frequently occupy the courts of law and equity, and especially the latter, are so great, that it seems wholly unnecessary to offer any apology in a legal journal for the employment of some of its pages on topics of which the interest is so pervading. The truth is, that the science of banking is in a transition-state. Notions respecting the proper duties and objects of a banker—the influence of his operations on the currency, and on prices, and the foreign exchanges, which were of universal acceptance so late as 1825, are, we don't hesitate to state, universally exploded at present. We trust, therefore, that in attempting to place before our readers, with some aid derived from the above work, and from other undoubted sources of the latest and best considered views, a condensed statement of leading principles, which govern the practical handling of the business of banking, and also of some of the rules which the law has laid down for the conduct and guidance of it—we may succeed more or less in serving the objects of those who have to choose a banker, and seek to learn the principles on which that choice ought to be determined; or who, having a banker, are desirous of making some approach, if possible, towards the means to solve the problem, whether he pursues his business in such a way as to deserve their confidence. If A is a banker who employs his customers' deposits in perilous adventures, he acts contrary to the rules of sound banking; if he evades or violates the law, as, for instance, in discounting accommodation bills, he is not in either case, it is obvious, such a dealer in money as a prudent man will trust with his cash balances. What we should wish principally to call attention to is, the complete mode in which the rules of law regarding banking support and confirm, as well as illustrate, those principles for the practical conduct of the business which have only of late obtained general acquiescence, the very opposite

notions having, but a few years back, prevailed among practical men; whilst the judges, in their decisions on banking questions, have never swerved from one line, the consequence of which is, that—the line having been on the first instance drawn with admirable truth—this head of law exhibits less of oscillation, and overruling, and variety of opinion and dicta, than perhaps any other of equal extent that can be mentioned. We believe the gratitude of the country is due in an especial manner to our judges for the enlightened views, the steadiness, and the scrupulousness with which, ever since questions of this description began to appear in the courts, they have administered the laws regulating the relations of bankers with their customers.

In strong contrast with this uniformity of the law, stands out the tenacity with which popular opinion—including in the expression, not merely the hastily adopted sentiment or belief of the general public, but the settled conviction of the business classes, the practical men, respecting these relations—has been adhered to by them until within quite a recent period. More than one commercial panic was attributed to the over issue of their notes by the country bankers, which was said, by unduly increasing the currency of the kingdom, to raise prices, and operate disastrously on the foreign exchanges, and lead directly to that state of collapse of trade, and general withdrawal of confidence in all transactions, which constitutes what is called a panic. Now, the best authorities among the practical men (Mr. Weguelin, Mr. Hubbard, and others) tell us—and no person comes forward to deny it, because the statement is rested on practical details which cannot be questioned—that an excessive issue of bank-notes by the banks of issue is impossible in the nature of business; and so the conclusion which was arrived at by the Bullion Committee of 1810 is at length the received doctrine,¹ and very respectable opinions have been given, that so far from the increased issues of the country bankers causing increased prices of commodities, it is the

¹ See Evid. before Committee of 1858, on the Bank Acts, pp. 345, 378, 379, 35, 180, q. 2619, 2620.—*Rep.* p. 25. *Logic of Banking*, pp. 203, 212, 353, 394, 463, 496, 502, 503.

rise in prices that causes for a time any increase in the country bank-note circulation which is ever observable. As regards the possibility of a banker materially increasing *en permanence* his note circulation, the question, it might seem, would have been at once disposed of, by adverting to the general legal relation between a banker and all his customers, whether note-holders or depositors with him, which the courts have always asserted, without any shadow of changing, to be that simply of debtor and creditor;¹ and this being once ascertained, the negative of the above question seems to follow, because the law affords no means by which a debtor can increase at his pleasure the number of his creditors, or the weight of his liabilities, and especially not in a case like that of a banker and customer, where each debt is payable on demand.

That portion of the commercial law which regulates banking, seems, as regards the great body of it, to be satisfactory to the public. It is true there is a large school of political economists, including many practical men, who complain of the operation of the Bank of England Charter Act of 1844 (7 and 8 Vict., c. 32), and others who dissent from the principle of the Joint Stock Banks' Regulation Act of the same year (7 and 8 Vict., c. 113), and many who deprecate the policy of applying the principle of limited liability to banking associations. A very small, indeed scarcely noticeable, amount of objection is felt to those parts of the law, touching this subject, which have been built up by judicial decision. The experience of both the Committee of the House of Commons on the Bank Acts which sat in 1857, and that which sat last year, shows this. Witnesses were examined before both on a great variety of heads, but extremely few material complaints, applicable to those parts of the law, were brought forward. The principal instance of this kind occurred in the course of the evidence before the committee of last year.² It was this:—The Bank of Ireland manages that portion of the public debt, the dividends on which are payable

¹ See Grant's Law of Bankers and Banking, p. 5—the cases collected.

² See Evidence, &c., pp. 286, 287, 288.

in Ireland. An incorporated body, the trustees of Evans's Charity, in Kilkenny, held in their corporate capacity some stock. Their secretary, with whom their seal was of necessity intrusted, affixed it without authority to powers of attorney for the transfer of portions of this stock, which he appropriated, forging the names of persons purporting to be attesting witnesses to the due fixing of the seal; and the Courts in Ireland and the House of Lords¹ held that the Bank was liable for the sum lost, and for interest, amounting on the whole to between £9000 and £10,000. But the apparent hardship of this result vanishes when the matter comes to be scrutinized. The case is one of those which occur so frequently in this department of law; and the *ratio decidendi* in which is involved in solving the question on which of two innocent parties is the loss to fall. Here the Corporation (that is, practically the objects of the Charity), and the Bank of Ireland, are the parties. The question, then, in this case, as in all others of the same class, is, which of the two innocent parties acted so as to open the way to the fraud being effectuated? Not the trustees, for they were not shown to have been guilty of any laches, or neglect of duty in any respect. But how was it with the Bank? They were bound to see that the deed presented to them for the transfer of the stock was a valid document—that is, that it was the deed of the body from whom it purported to come; to ascertain that it was not sufficient to observe that the seal affixed to it was the common seal of the Corporation—yet that was all they did. They omitted to inquire as to the genuineness of the attestations (made necessary by statute), and so let in the fraud, and the loss was properly cast upon them, according to the universal rule in all cases, where, from the circumstances that have occurred, it is inevitable that a loss must be suffered, and the only parties upon whom it can fall are innocent of the fraud, or any evil intention contributing to the loss. It may be that the case is one of that

¹ See *Bank of Ireland v. Evans's Trustees*, 3 Irish Law Report (N. S.) 280, S. C. 5 H. Lds. 389. Also, *Young v. Grote*, 4 Bing. 259; *Marsh v. Keating*, 2 Cl. and F. 264; *Bridgman v. Gill*, 24 Beav. 302.

large class which courts of justice would much prefer to be spared deciding ; but any one who will consult the reports of the case, and weigh the facts and arguments, and study the decision, will have little difficulty in concluding justice to have been done, and not to have been attainable in any other way. Some familiarity with the determinations of the courts on banking questions has led us to the opinion, that the great mass of them are capable of being shown to rest on sound principles, and to have been carefully decided ; and that such of them as present at first sight an aspect of harshness upon the side adjudicated against, will invariably be found to wear that appearance solely by reason of the necessities of the particular combination of circumstances involved ; justice and conformity to the requirements of the general law being otherwise unattainable. One thing may be alleged with certainty ; no layman can deal with, or canvass points of banking law to any useful purpose, without unceasingly bearing in mind that what is called the common-sense view—which so often means only the first sight, the casual, superficial view—but seldom comparatively coincides with the view which research and inquiry, conducted upon a circumspect and cautious reference to all the circumstances of the case, and with a knowledge of what has been found to be right in former instances of a similar character, ultimately develop. Mere common-sense cannot determine the justice of legal conclusions one bit the more than common-sense can determine the figure of the earth, or prove the circulation of the blood.

With respect to the banking legislation of 1844, many more and stronger objections have been advanced, and perhaps maintained. The Bank Charter Act, it has been urged, is a fair-weather measure, operating only in periods of tranquillity ; but when seasons of pressure and panic arrive, requiring, for the salvation of commerce and the peace of the country, to be suspended—in fact, violated—and acts of indemnity to be passed for the security of all who are parties in the misdemeanour. That the necessity for two instances of such breaches of the law should have arisen in the short interval which has elapsed since

its passing, is undeniably a startling circumstance; and though we will not undertake to say that it is as undeniable, yet it must be said at the least to be probable, that the result of the late parliamentary investigation has been to advance the cause of the opponents of that measure. The principal charges against the act of 1844 may be fairly presented in a condensed form, thus:— There have been above fifty changes in the Bank of England's rate of discount (the Bank rate, it is needless to say, measures the rate of the general money-market). Fluctuations in the rate of discount never occur without affecting trade; low rates produce excessive speculation; high rates depress prices. Excessive speculation leads to a foreign drain for bullion, and the Bank on that raises the rate of discount, in order to counteract the tendency of the bullion to flow out of her vaults. As the drain continues, the rate is still further raised. Bankers and merchants throughout the country, finding from the Bank returns what is the state of the reserve of unemployed notes and bullion, and marking also the situation of the exchanges, begin to feel that one of those periods of pressure is probably at hand, of which a continuous drain on the bullion in the Bank has ever been a forerunner; and therefore begin to contract their operations, to draw together gold and Bank of England notes—to hoard, in fact. The result is disemployment of labour, scarcity of money, the making of payments by means of bills of exchange, since gold and bank-notes are not readily to be had. These bills are sent up to London for discount in unusual numbers from the great centres of trade—the cotton and wool trades especially—aggravating the pressure for discount. The Bank of England, besides raising the rate of discount, has by this time diminished the *echéance* of bills; thus rendering it still more difficult to obtain money. At length the evil rises so high that solvent houses, presenting perfectly sound commercial paper, cannot get discounts; or the period of the inconvertibility of the bill of exchange is reached, confidence is gone, and panic has set in; and the only remedy is the government letter, authorizing the Bank of England, by means of violating the statute, to produce an unlimited supply of bank-notes

to meet the public wants, and allay the general apprehension. It is to be observed that the mode of payment by way of bills and drafts on London, is resorted to so extensively in times of pressure; that in 1857 probably sixty per cent. more debt was paid in this way than is the case in the ordinary normal state of trade;¹ and there is, connected with this, another fact, which accounts for a considerable amount of hoarding of Bank of England notes and gold in the hands of the country banks of issue; and explains why such hoarding begins at an earlier point on occasions of apprehended pressure than it otherwise would do, thereby accelerating the crisis. It is this:—The Bank of England absolutely refuses all discounts to a note-issuing banker upon any terms whatever. Rothschilds' bill, even at seven days, presented for discount by a country banker who issues his own notes, is refused discount. The prohibition extends even to advances upon exchequer bills.² The banks of issue, of course, feeling that they have no one to look to but themselves in moments of pressure, commence strengthening their reserve by hoarding gold and Bank of England notes, upon the first symptoms of danger becoming discernible in the commercial horizon. That the immediate effect of commercial anxiety, incident upon the rise of discount at the Bank of England, is to swell the number and amount of the bills of exchange which come up to London for discount, is apparently quite certain;³ and it also appears to be well made out, as one of the ultimate effects of a crisis, that even first class paper becomes practically inconvertible.⁴ These matters become of immensely more importance and significance in the eyes of those who are aware how largely bills of exchange enter into and form a part of that wonderful mechanism, the circulation of this country. There are also some

¹ See Evid., pp. 192, 194.

² See Evid., pp. 193, 194, 376, Q. 5631.

³ See Evid., pp. 331, 333, 335, 340, 341, 382, 383.

⁴ See Evid., pp. 150, 151, 152, 153, 161, 174, 193, 194, 331; Q. 4978, pp. 333, 336; Q. 5062, p. 341.

minor points of objection to the operation of the act, which we will not now consider.¹

With respect to the Joint Stock Banks Act, a great deal of invective has been indulged in, betokening that excited state of the passions in which it becomes unsafe to rely implicitly on the statements advanced; but, apart from that, there can be no question, vast benefits, together with some evils, have followed from the establishments which have sprung up under that legislation. Next to locomotion, and before insurance,² the joint stock principle has probably been most largely applied to banking of any species of commercial enterprise. The general success of these banks hitherto is marvellous. The London joint stock banks are considered to hold in deposits at call, or at a few days' notice, upwards of forty millions sterling; the London and Westminster Joint Stock Bank holds upwards of thirteen millions sterling. It is stated that these enormous amounts are formed by the aggregating of small sums, which were never deposited in banks before, belonging to small shopkeepers, farmers, servants, &c., who, for the first time, have been tempted to keep a banker by the interest which these banks pay upon their deposits. The whole forms a phenomenon most striking, and most attractive for examination. But at present let us see what are the objections which the mercantile world allege against the joint stock banking legislation. Now, the main complaint is this—The absence of adequate fulness in the periodical statements of the accounts, it is alleged, leads to great evils. The law has left this matter, it is said, too much at large. Every one ought to be enabled to tell from the published accounts exactly what is the real state of the bank in each year, and what is their course of trading, by a comparison of the accounts year by year. For instance, the accounts ought to state every half-year the amount of the overdue bills on hand, and the probable amount which

¹ See *Logic of Banking*, pp. 335, 448, 454, 475, 476—486.

² In all probability the sums at present insured in the United Kingdom amount to, if they do not exceed, £200,000,000 sterling.—*Edinburgh Review*, January, 1859, p. 37.

they would realize; so that, if it were found that the bank had £200,000 of overdue bills as its usual sum under this head, but that in some one half-year's account the sum stood at £500,000, the circumstance would attract attention, and lead to inquiries being made by the proprietary, who might thus, by means of an improved form of account, be enabled to exercise a real and beneficial check upon the management of the business. As the existing law stands, these periodical statements of the affairs of joint stock banks, though they may be framed entirely in conformity with it, are not only, it is considered, not sure guides to the public as to the real state of the banks, but are absolutely fallacious.¹ Now, there seems to be no adequate reason why this defect should not be altered without delay, provided it could be effected, as the plans suggested seem to show, without disclosing the state of particular accounts, and so violating the confidence which must and ought to subsist between banker and customer. So long as this cardinal object was secured in full integrity, there could be no valid ground on which the banks could object to a full statement of their transactions being communicated at short periods to their shareholders. The existing enactment on this matter, it will be remembered, is 7 and 8 Vict., c. 113, s. 4, providing that every deed of partnership or settlement shall contain provisions for the publication, once at least in every month, of the assets and liabilities, and for the yearly communication to every shareholder of the auditor's report of a balance-sheet and profit and loss account. But what are assets? what are liabilities? and what is the value of the auditor's report as the law at present stands? All these points are, in fact, far from settled; and some legislation seems to be indispensable, either to explain what shall be taken as assets and what as liabilities, or altogether to alter the requirements in respect of these accounts, by insisting on such a degree of fulness in them as would enable persons, by reference to first

¹ See Evidence of Mr. Kirkman Hodgson, M.P., Evidence, p. 250; and see pp. 134, 135, 316, as to this, and as to modes proposed for improving the published accounts, so as to convey more specific information.

principles, to form a judgment for themselves of the transactions of the company, that had resulted, or were in the process of resulting, in assets on the one hand, or liabilities on the other. As to the audit, we shall have a word to say by and by. In the mean time, one observation must strike every one. If the accounts rendered by this class of banks, in strict accordance with the provisions of an act of Parliament, fail to convey any practical quantity of information to the proprietors or the general public, assuredly they cannot be supposed at present to carry into effect the intentions of Parliament. The annual report, it must be remembered, though in form the report of the directors to the general meeting or to the company, is in fact, and in legal effect, the statement of the company as a body, and the company as a body is responsible for the truth or falsehood of the allegations contained in it—a principle from which very grave consequences may follow. Nor are instances wanting in the courts in exemplification of this, particularly as regards questions of contribution from shareholders on winding-up.¹

Another reason why it seems to be imperative on Parliament to make provision for the publication of accounts in such a form as shall be effectual to let light into the real state of the company's affairs is this:—By the Joint Banking Companies' Act, 1857 (20 & 21 Vict., c. 49. s. 3, 14), the provisions of the Joint Stock Companies' Act, 1856, for the appointment of inspectors by the Board of Trade to examine into the affairs and report thereon, &c., is made to extend to joint stock banking companies, but only upon the application to that department of one-third, at the least, in number and value of the shareholders in the company. Now, in the first place, it is next to impossible, with the present accounts rendered to him, for a shareholder to form any judgment as to whether a case has arisen for a government inspection or not; and it must be remembered that any such proposal, except on the most ample and pressing reasons, would

¹ *Ex parte* Brockwell, 26 L. J. Chanc. 859-863, where see the previous decisions examined; also *Ex parte* Duranty, 28 L. J. Chanc. 37; *Ex parte* Bigge, *id.* 50.

probably meet with discouragement amongst the proprietary, as obviously tending to shake public confidence in the concern, to cause the shares to fall in the market, and depositors to withdraw their accounts, &c. Secondly, working with nothing more explanatory than the present forms of accounts before him, a government inspector would probably be much embarrassed in prosecuting his inquiries to a satisfactory issue. Will it aid him much to have all officers and agents of the company bound, under a penalty of £5, to produce any book or document in their custody or power, and to answer any question relating to the affairs of the company? The primary difficulty still remains, for he has no clue to guide him through the mass of transactions to the unsound spots. The same objection applies to the general meeting's inspector. Audits, as at present conducted, strongly exemplify what is advanced above; in practice they are found to amount to little more than nothing; at all events they cannot be said to impart more than the slightest degree of security. Nor is it difficult to see how this is the case. For, in order to afford a real result available for the purpose of ascertaining the actual state of the bank, what is the task of the inspector or auditor? He must ascertain the status of every account, he must know where to write off each debt as paid, he must value every security on which the bank has advanced, he must estimate every overdue bill, and tell whether it is likely to be paid by any of the persons whose names are on it—a most tedious and necessarily lengthy series of operations, even supposing that the bank inspected had embarked in none but legitimate banking business; but capable of being indefinitely extended in duration and difficulty, in cases where the business was of a speculative character, or even in the case of bills rediscounted, and therefore out of the hands of the bank. In fact, no inspection or audit can be of much value, unless it be conducted by a person having a knowledge of the concerns of the establishment equal to, or perhaps greater than, that of the directors and manager themselves. In any other circumstances, the report could be little more than that the system of book-keeping was correct;

that all the arithmetic of the bank was accurate and properly vouched ; that the balances were right as compared with the entries in the ledger ; that all the securities stated to be in the possession of the bank, were actually seen by him in the cashier's box or case ; but, about the value of the securities, the *cardo rerum*, he would not, without such degree of knowledge as is obviously unattainable by a stranger, be able to say any thing decisive.¹ In auditing a bank, and taking an account of the assets, every thing depends upon the judgment founded upon knowledge of the person taking the account. A bill of exchange, for instance, is either the very best banking asset or the very worst, and how is a stranger to know whether the bill is a good commercial bill or a kite ? Yet on the judgment which he forms, that is to say, on the knowledge which he has of the dealings of the bank, and of the class of persons with whom they are used to deal, it depends whether he counts the bill as a good or a bad asset. That such a form of account could be devised as would fully meet all the difficulties in the way of setting about an efficient audit or inspection, we do not say ; because we know that a bad banking security, that is to say, a security which a banker, acting on sound banking principles, would not look at, may, nevertheless, *ultimately* turn out to be productive and a good security ; and it would be an extremely difficult task to value such a security for a balance sheet ; but what we say is this : We are not yet convinced of the impossibility, without improper disclosures, of rendering such accounts to the shareholders as would give them the means of judging, in any case, whether the time was come when the one-third ought to apply to the Board of Trade for an inspection, with a view to see whether it would be prudent to wind up the concern, or whether they would be justified in going on in the actual state of their affairs. We contend also, that accounts of a more particular and special character might and ought to be required by Parliament, to be furnished in case of an inspection to the inspector, to be seen by him alone in such

¹ See Evid., pp. 252—256, 296, 316, 319, 320, 322.

form as would facilitate and abbreviate his labours; and make the Joint-Stock Companies' Act 1856, as applied to joint-stock banks, an operative enactment. At present, with the machinery supplied, it must needs be a mere dead letter for the purpose of discovering the actual state of one of these gigantic bodies. Except with the object of guarding against misapprehension, it would not be necessary to add what we are quite aware of, namely, that no form of account can ever be framed by any human ingenuity, which will effectually protect shareholders from the absence, in managers and acting directors, of the essential qualities of prudence, integrity, judgment, vigilance, and knowledge. But the admission that a perfect system cannot be devised, is no argument for not attempting the improvement of one which is materially imperfect.

There appear to be several evils arising out of the existing system of the directorate in joint-stock banks, which are not undeserving of consideration with a view to their amendment, assuming, for the present, that the system in itself has advantages sufficient to make it deserving of retention in any case. Mr. Gilbert observes, "The constitution of joint-stock banks appears theoretically absurd. The manager—the banker—who is presumed to have some knowledge and experience in banking, is placed under the command of a board of directors, whose knowledge and experience are supposed to be inferior to his own. These directors are again placed under the control and instruction of a body of proprietors, whose knowledge of banking is much less than that of the directors."¹ If the system is found to work well, it is only so far as it departs from the theory, and abandons the principles on which it is based. How, then, is this effect produced? In the inception of the system of joint-stock banking, the forcible objection to them was this—"Under these arrangements, every customer's account is liable to be inspected by any one who may get into the direction, and who may be perhaps a rival or competitor in trade of the customer." To meet this outcry, the invariable rule and practice in all joint-

¹ *Logic of Banking*, p. 228.

stock banks has been, that the body of directors shall not be allowed to see the accounts of the bank ; in general, the directors are not cognisant in detail of the operations of the bank, or of any individual transactions whatever.¹ In many cases there are appointed out of the body or board of directors, two or three who are called managing directors, who give a more continuous and close attention to the affairs of the house than the rest, and are more intimately conversant with the proceedings of the manager. But these persons, like the rest of the directors, are either men of business engaged principally, and giving their best attention to concerns of their own, and therefore, at the best, affording but a subordinate and incidental supervision to the affairs of the bank ; or they are not men of business, and the attention they give to the bank is in consequence probably but of little value as regards the interests of the shareholders. Practically, every thing depends on the knowledge, and skill, and banking ability, the fidelity and integrity of the manager, who is usually a person who has been bred to the business ; although it is believed that, in most cases, the rule above alluded to does not extend to exclude the managing directors from the power of obtaining a full knowledge of all that is done in the bank. Now, considering how much the existing theory requires of the directors, and the part in the actual conduct of affairs which it was the intention of Parliament, manifested by the responsibilities which it has cast upon them, that they should *bonâ fide* assume, it is certainly somewhat startling to find the practice to be such, that in many cases the directorate as a whole is of little or no assignable use, as far as government or control is concerned. Nevertheless, the law requires them to put forth to the world periodical statements authenticated by their signatures, of the real effect of which, as the practice is, they must oftentimes be ignorant. Such a position is not, to say the least of it, an enviable one to be placed in. The Joint-Stock Companies' Act, 1856, materially aggravates their respon-

¹ Evid., pp. 295, 296, 250, 256, 344.

sibility in those cases of banking companies to which it applies,¹ by enacting² that directors knowingly paying a dividend when the company is in an insolvent state, or any dividend which would to their knowledge render it insolvent, shall be liable for all the then debts of the company, and for all that shall be contracted thereafter during their continuance in office, with the proviso, however, that such liability shall not exceed the amount of such dividend; and with the further proviso, that if any of the directors shall be absent at the time of making the dividends, &c., or shall object thereto, and file their objection in writing, &c., they shall be exempted from liability. To conclude, however, from the above considerations, that a joint-stock bank cannot be as well managed as a private bank would be erroneous, because, practically, the administration devolves upon the manager, an officer required by the statute to be appointed in each joint-stock bank, whose whole time is as constantly devoted to the business as that of private bankers. After all, the courts do not recognise the practice of joint-stock banks where it departs from the spirit of the act of Parliament. It has been laid down to be the duty of directors to know the real state of the company, and to take care that the real and actual position may be ascertained by the books. Therefore there is no excuse for them if the books shew a balance of assets over liabilities, when the fact is really otherwise.³

As to shareholders in joint-stock banks no complaints seem to be made of their actual position, of the *quantum* of responsibility which they incur, or even of the three years retrospective liability which the statute fixes on an outgoing shareholder. If, however, the thing were matter of choice, one would desire to see a wealthier and more intelligent class of persons coming forward to take shares in joint-stock banks. At present, experience shews that there is among them a very

¹ See 20 & 21 Vict., c. 49, s. 18.

² 19 & 20 Vict., c. 47, s. 14.

³ *Ex parte Ayre*, 27 L. J., Chanc. 583. But compare carefully *Ex parte Bigge*, 28 L. J., Chanc. 50.

large proportion of widows, servants, policemen, clergymen, and other persons in no way conversant with the business of banking, who are in consequence wholly incompetent to exercise any supervision, or form any opinion of the direction in which things are going. For the great body of shareholders in joint-stock banks, the shares form a tempting investment; without the trouble of trade or business of any kind, this capital yields double or treble the return in the shape of dividend. There is, it is true, the risk of unlimited liability in most cases; but practically, this class of proprietors enjoy all the benefits of a limited liability; they may, if the worst comes, lose the whole sum invested, but beyond that they are safe; a claim against the bank will never, they can depend upon it, be enforced upon one of them. But the fact of the liability of the shareholders in the bulk being unlimited, no doubt, not only tends to invite this class of persons, of whom we are speaking, to buy shares, trusting to the available responsibility of the other and wealthier members of the body, but it operates to create a general impression of indefinite wealth in the bank, and so induces depositors to trust it more readily, and moreover to abstain from examining into the character of the business transacted, even when the means exist for doing this effectually.¹ In fact, from the common want of knowledge on this subject, most persons, even among educated classes, find some difficulty in forming a correct judgment as to the mode in which the administration of a bank is carried on. The Union Bank of Glasgow has paid 8 per cent. annual dividend for a considerable time past, and now pays nine per cent., which the proprietors do not consider a high rate of dividend; they would be frightened, it is said, if too high a rate were paid them, just as prudent persons about to insure their lives are scared from the offices whose rate of premium is unusually low. But, then, what is too high a rate of dividend to be safe to receive? Some joint-stock banks in England

¹ Evidence of Mr. Kirkman Hodgson, M.P. Evid., pp. 250, 251; see also Mr. Coleman's evid., Id., p. 138; and see Id., pp. 276, 277, 304, 310, 311, 313, 344.

have paid 11 per cent., and some have divided even up to $22\frac{1}{2}$ per cent., on the paid up capital. Now the common inference which you hear made, even among thinking men, in respect to such cases, is, "How can these people make profits such as to enable them to pay interest to their depositors, and also these enormous percentages to their shareholders?" or, "This bank gives 5 per cent. interest on its deposits, and invests them in government securities which yields 3 per cent., and pays its shareholder a dividend of 10 per cent. out of the profits. We should like to know how this is done?" Now there is nothing impossible in this, it will turn out, on the explanation being made, that the bank gives 5 per cent. interest on a part only of its deposits, such, namely, as are retained for a stated period without diminution, and are repayable on notice; on another description of deposits it may pay less than 5 per cent., and on current accounts no interest at all. Then the capital may be invested in Consols, and a proportion of the deposits and current accounts, leaving always a working reserve in the till, may be employed in discounts at 6 per cent. per annum, and in such case an established concern with a large amount of deposits may well afford to pay dividends of 10 per cent. to its shareholders. For on what is that dividend paid? *Only on the capital paid up.* The fallacy, or the mistake, or misunderstanding, lies in confounding dividend and profit. A bank may divide 20 per cent. on its paid up capital, while its profits on the sum it employs may not be at half that rate per cent. per annum. Thus, suppose a bank with a capital of £600,000 paid up, divides at the rate of 20 per cent., it is manifest that, supposing the deposits to be £10,700,000, (no fabulous case, because the thing has actually occurred,¹) and these or the bulk of them to be employed at a profit of about one per cent. net (after allowing for interest paid to the depositors, &c.), and the capital to be invested in government securities at 3 per cent.—*that would account for the dividend.* Thus a business ought to be conducted on the purest banking principles (the most unobjectionable and most approved mode of making

¹ See Logic of Banking, p. 544.

profits in banking being to invest the capital of the house in government securities, so as always to have at hand a reserve readily convertible to meet unforeseen pressures or demands, and to trade with that part of the deposits which it is safe to carry on the daily business without, chiefly by discounting good commercial bills of exchange); and yet, when the deposits are large, dividends may be safely declared and paid at very high rates of per centage on the paid-up capital of the shareholders. These considerations show how easily mistakes are made on this subject of banking; and, withal, how easily they are rectified by the application of a little calculation founded on a little knowledge of facts. Banking, in fact, consists in borrowing from *a b c*, &c., and lending to *A B C*, &c., the money so borrowed. The regular banker does not use his capital in his daily business. He keeps *that* invested in securities—generally government securities, but, at all events, securities convertible at a short notice; and he keeps it so invested in order to be ready to meet contingencies, and put his mind at ease, and the minds of his customers, by having a reserve to fall back upon. As is obvious, as long as the confidence of the public remains unshaken, and, therefore, the deposits continue large, the capital never is wanted for the purposes of the bank. The bank may go on just as well without it; and, in fact, banks have been carried on for years after all the capital and all the property of the partners, and half the deposits, had been irrecoverably lost. Public confidence, the general persuasion in their stability, supplied the place of all these. Accordingly, in private banking, even when the partners are all wealthy men, it is not customary, it seems, to invest much of their property as capital in the bank business—for the reason that much capital is not required. Hence the profits of the partners in a private bank are (it is said) usually higher in proportion to their employed capital than the dividends paid to the shareholders in joint-stock banks.¹ It is the publicity of their accounts which renders it necessary, for the sake of inspiring confidence, for the joint-stock banks to have so large a propor-

¹ *Logic of Banking*, p. 545.

tion of capital called up; for, in fact, in large concerns it is found that the payments into the bank nearly balance the sum drawn out of it each day through the year. Therefore it is not necessary, in ordinary times, to keep much cash in the till—the larger demands for sums to be withdrawn from the banker's hands being almost invariably met by a draft upon London, where he keeps a reserve for such occasions, and where such reserve probably pays him interest, being employed in discounting short bills, &c. The charges which have been made against the London joint-stock banks as to the habitual state of their reserves, seems to have been disposed of by Mr. Gilbert.¹ A proposal that was made before the committee of 1858, that those banks should be obliged by law to take no more deposits than should be in a certain proportion of the paid-up capital:—for instance, that if the paid-up capital was £500,000, the bank should be at liberty to receive £2,500,000 or £2,000,000 of deposits—that is, 20 to 25 per cent. on the paid-up capital²—does not appear to be supported on any principle, or to be called for on any grounds that are ascertained; and as the committee in their report omit to notice this point, it may be supposed not to be deserving of much consideration. It was at one time under contemplation in the Bank of England parlour to return to the proprietors a portion of the capital, as the directors did not think that to retain it was necessary for the business; and no one seems to question the prudence, or deny the skill, with which the Bank has been administered of late years. However, a move in the opposite direction, of a call up of more capital (distasteful dose as it would be to the shareholders in joint-stock banks to swallow), might possibly have such an alterative operation, as would cause them to open accounts as customers with the banks to which they belong, to a greater extent than at present, as we judge, is the case;³ and so possibly this sore place might be cured, and perhaps even the other more angry imposthume, that

¹ *Logic of Banking*, pp. 539—588.

² *Evid.*, pp. 134—137; and compare *Evid.*, p. 138, Q. 2037, p. 387.

³ See *Logic of Banking*, p. 285.

the country joint-stock banks, to some extent at least, insist on having for correspondents in London, not their brethren of the *Toison d'or*—the London joint-stock banks—but the old private banking establishments.¹ The position of the shareholders in all cases of incorporated joint-stock banks is not, it is to be remembered, that of a partner or principal in the transactions of the company; he is not the banker, but it is the incorporated body with whom he is not identified² that performs the business, is the banker, and is responsible for the conduct of affairs. On the one hand, therefore, a shareholder is not liable to be sued upon the dealing, covenants, and undertakings of the company; he is only liable after judgment has been obtained against the company—his liability being the subject of very peculiar statutory provisions.³ On the other hand, that the company's affairs are being arranged in bankruptcy, or under the winding-up acts, is no answer to a motion for leave to issue execution against him upon such a judgment, in the manner pointed out by the statute;⁴ nor is it an answer that he was induced by fraud to become a shareholder, and that as soon as he discovered the fraud, &c., he had repudiated his connection with the company.⁵

Let us next advert more fully to that which can hardly be denied to be the most striking financial phenomenon of the day. Joint-stock banking, no one needs to be told, has advanced and developed, and on the whole prospered, in a manner wholly unprecedented and unexpected. It has been calculated, and, as excellent authorities believe, accurately calculated, that in October, 1857, there was held in London by the joint-stock banks, at interest *and on call, or at seven days' notice*, between

¹ *Logic of Banking*, p. 400.

² Per Lord Wensleydale in *O'Flaherty v. M'Dowall*, 6 H. Lds., 182.

³ *Fell v. Burchett*, 3 Jur. N.S., 388, Q. 13.

⁴ *Morisse v. Royal British Bank*, 3 Jur. N.S., 137; and see *Cleave v. Harmer*, 3 Jur. N.S., 190.

⁵ *Daniell v. Royal British Bank*; 1 H. & N., 681. See *Fry v. Russell*, 27 L. J., C. B., 153; *Hemlinon v. Royal British Bank*, 26 L. J., Q. B., 112, 114; *Powis v. Harding*, 26 L. J., C. B., 107.

70 and 80 millions sterling.¹ This might be held out as giving some idea of the sums which the joint-stock banks in the aggregate throughout the country hold in deposits, were it not that the amounts specified baffle and bewilder from their vastness; but at least the figures suggest this safe inference, that the sums so held are enormous to an incomprehensible extent; whence, then, have they been provided? No one appears to have alleged, as matter of knowledge, before the committee of last year, when the subject was several times touched upon, that the joint-stock banks have merely got transferred to their keeping accounts that were formerly kept at private banks. Mr. Gilbert is positive that such is not the case, and that few or no accounts have been withdrawn out of the hands of private bankers, to be confided to those of the companies. Indeed, it seems that the deposits with private bankers have universally increased of late years.² If we are not mistaken, the great weight of authority goes to shew these sums to have been contributed by classes of persons who never before employed bankers, or invested the small sums of surplus that might from time to time be lying in their hands. If we are not mistaken, the price of consols of late years has kept a range which is unfavourable to the supposition that any large portion of these sums has been removed from government securities as an investment, and deposited as an investment, for the sake of the interest given, in these banks; certainly the condition of the savings banks shews no symptom of the removal having been made from thence. In the year 1857, the authorized returns shew capital deposited in savings banks, £35,108,596 against £34,946,012 in 1856. Then the fashion for investing in foreign securities has not passed away in favour of the British joint-stock banks. In September, 1857, the calculation was (as the Governor of the Bank of England told the committee of last year), that American securities were held here to the extent of eighty millions sterling.³ The truth

¹ Evid. of Mr. Kirkman Hodgson, M.P., Evid., p. 259, Q. 3654.

² Evid., pp. 92, 93, 378, Q. 5665.

³ Evid., p. 2.

seems to be this: Vast numbers of persons, who, on the one hand, never before employed a banker, and, on the other, were not much in the habit of investing either in British or Foreign securities, but who kept in hand, in their homes for the most part, any small sums that they might have to spare above their daily wants, attracted by the high interest given by the joint-stock banks, upon sums deposited with them at very small notices, and in many cases absolutely at call, have flocked to them to place their money there. Many persons, it may be fairly surmised, under the same temptation, by means of greater thrift and self-denial, have been led to save and accumulate, and to have sums to deposit, who never owned a surplus or a saving before. In Scotland, where banks are very numerous—indeed, there are nearly as many banks, if we include branches, in Scotland as in the whole of England and Wales—the system of giving interest on deposits has long been known, and works in the same way, or (perhaps we might say) performs still greater miracles. The whole population of Scotland is about three millions, we believe; nevertheless, the amount of money which they deposit in their banks at call or short notice, but at interest, was, according to the calculation of well-informed persons, considered to be fifty millions sterling in November, 1857.¹ The tendency of all this, the consequence of the position in which the joint-stock banks find themselves, by having these immense masses of money forced upon them—that is the language used—is said to be to incline their managers to run greater risks of losses in some cases, than is consistent with prudent banking; because it is said, as the interest on all this money has to be provided for immediately, and the dividend to be maintained besides, the temptation is to discount a lower class of bills than is prudent, and perhaps even, it is said, this course may be instrumental in giving currency to bills that probably ought not to be discounted.² The notion of the generation which is dying out

¹ Evid. of Governor of Bank of England. Evid., pp. 22, 65.

² Evid. of Governor of Bank of England. Evid., pp. 58; Q. 924, 59; Q. 926, 68; Q. 1101; and see and compare Mr. Salomon's Evid., *ib.*, p. 71, 72,

was, that to give interest on deposits is not banking, and no part of a banker's proper business; but there is no better ground for this than for the notion (which yet prevailed for many centuries), that it was no part of the business of a Christian to take interest at all. The theory of the joint-stock banks is certainly plausible. These banks give, their advocates say, an advantage to the person who has money which he does not propose to invest in securities which he might perhaps be called upon to realize at times when he could not do so without loss, by giving him the opportunity of obtaining interest upon it at the same time that he can recall it at pleasure. To the borrower, on the other hand, they hold out the opportunity of obtaining money on the lowest terms known in the market. In short, as the fact has been expressed, "the public, rightfully or wrongfully, have certainly taken to joint-stock banking;" and this fashion or fondness, together with the increase of late years in the amounts held by private bankers, leads to the estimate of one thousand millions sterling, as the grand total held upon deposit by the banks of this country. True it may be, that some of these companies have advertised in the newspapers with a view of attracting notice and getting hold of business. Some shareholders of a few of them may have been known to solicit tradesmen and others to join them, and open accounts, &c. The expenses moreover of management may be larger than in private banks; still we apprehend it to be difficult to pronounce this system, at any rate as yet, with the limited experience which the country has of them, to be incapable of securing, upon the whole, advantages to the community, and, at the same time, profits to the shareholders. All the witnesses before the parliamentary committees of 1826, testified to the great benefits arising from the universal adoption of a similar system in Scotland. Why should the contrary effects, or any inferior effects, be looked for here? The London

78; Q. 1221. Mr. Coleman's Evid., ib., pp. 133, 137. Mr. Foster's Evid., ib., pp. 145, 146, 157. Mr. K. Hodgson's Evid., ib., pp. 250, 257, 258, 259, 263. Mr. Haliday's Evid., ib., p. 274.

Evid., p. 164.

joint-stock banks, it is to be remembered, do not follow exactly the Scotch system in respect of allowing interest ; for the Scotch plan is to allow interest on the daily balance, calculating the interest, day by day, at the same rate which they allow on deposit receipts. But the London banks allow interest only at the rate of one or two per cent. on money retained above a month in the bank, with other regulations tending to render the rate of interest paid in London lower than that given in Scotland. Since the establishment of joint-stock banks the dividends received by creditors in cases of bankruptcy have been found in general (it appears) to be larger than those realized from the estates of the private bankers that fail. The ruin is more widely spread, it is true, when a joint-stock bank becomes insolvent, as not only depositors but shareholders suffer—in the aggregate, a much greater number than can in general be affected by the failure of a private bank. But a similar objection may be applied to the great joint-stock carriers. When a railway accident occurs, it may be said the infliction of pain, damage, and death—the *strages*—is far more fearful than was possible under the old stage-coach system of travelling ; yet railways are permanently established in the nature of an institution of the country, and so far as joint-stock banks draw into use money that formerly lay dead, they confer a benefit on the mercantile community, by rendering money cheaper and more abundant ; and it cannot be doubted but that, in November, 1857, the Bank of England was enabled to afford the extent of accommodation to trade which was afforded (previous to the 12th, when the Government letter appeared) by her, in a very large proportion, from the large deposits with her made by the joint-stock banks, and formed out of the small sums which were attracted to them in the manner that has been mentioned, and which, but for the joint-stock banks, would not have been available for discounts at all. The fact cannot be questioned ; the benefit to the commercial body and to the whole country is undeniable. In consequence of the great and rapid growth of the monied classes which has been in progress in the last quarter of a century, the

want for more banking has been felt ; that want has been met by the application of the joint-stock principle to money dealing, together with the adoption of the Scotch scheme of paying interest on deposits, with modifications ; and hence the vast increase in the sums held on deposit, and the vast increase of bankers' reserves which were in the hands of the Bank of England at the time of the pressure in November, 1857, and which had been placed there by the joint-stock banks, in order to be in readiness in case any sudden demands should have been made on them by their customers for the re-payment of the sums they held, on call or at short notice. It is not to be forgotten, among other advantages, such as the promotion of habits of prudence, self-denial, thrift, and forethought, which an extension of the habit of keeping a banker gives rise to, how largely it serves to economise the circulation. The system of payments by cheques and bills, instead of by coin and notes, which springs out of the now generally diffused practice of banking, has had so much effect in this way that the circulation, as regards gold and notes, is found to be actually smaller than it was some time ago. Payments are more commonly made by transfers in account ; credit is substituted for money to an almost incomparably greater extent than formerly ; and the national gain (at any rate in ordinary times) is certain. Every one acknowledges the immense expansion of trade and manufactures, and no one disputes the ample proofs of the fact which the tables of exports and imports afford, and which are patent to the eye in the rapid advancement of our great towns. But when you say this, do you not at the same time imply that fresh uses are thereby created for money ; new fields of employment for capital opened, affording quicker returns than were possible to be had under less active and animated commercial conditions, when transactions were rarer and money changed hands seldomer, in a poorer period ?

“The same sum in a rich country will effect perhaps ten successive operations of exchange in the same space of time as one in a poor country. In a poor country, after a dealer has disposed of his wares, he is sometimes a long while before he can provide

himself with the returns he has in view, and during the interval the money proceeds remain idle in his hands. Moreover, in a poor country, the investment of money is always difficult. Savings are slow and gradual, and are seldom turned to profitable account until after a lapse of years, so that a great deal of money is always lying by in a state of inaction.”¹

Hence it may well be that modes of banking which were thought unsafe, or at least not *en règle*, among the older bankers, the experience of these days may show to be sound and beneficial; and as, for instance, to lend money on railway debentures has at length come to be considered no infringement of the banking canon against investments on inconvertible securities, facts having shown the pedantry of such a notion, so the payment of interest on deposits contains in itself nothing to alarm the most timid; at any rate, in times when it is possible for the banker to employ a portion of those deposits in such a way as to derive a satisfactory profit, chiefly by discounts of bills having no long time to run, and to arrange the run off of the bills he discounts in such a way as to secure his being at all times in funds to meet the demands that may be expected to come upon him. The capital of the bank he does not employ in this way, but invests in Government securities, so as to be available at the shortest notice to satisfy unexpected demands, and to give that confidence to the public and to his customers which is the heart's blood of his business and the richest of his assets. As we have said, there is no substance in the commonplace objection against the joint-stock banker because he professes to pay interest on deposit accounts, and also to pay large dividends on the paid-up capital. If a customer brings in £100 on a deposit account, and the banker discounts out of it a good commercial three months' bill at five per cent., then the interest on the deposit only being payable in most cases when it has been retained a month, he can afford to pay his customer a satisfactory interest for however short a time the money may be retained over the month, and a very handsome interest if it be retained for a twelvemonth, it

¹ Say—Polit. Econ., Bk. II., cap. 4.

being supposed that the money is used or turned, in the same process of discounting, four times in that period ; and in either case a large surplus will remain for the part payment of dividend on the capital, to be added to the three per cent. which that capital has been making during the same time on its investment in Consols, and which sums together make up the total dividend paid.

The rate of discount at the London joint-stock banks is always, it is to be observed, lower than that of the Bank of England ; and there is this additional drawback and burden in discounting with the latter—If you have a discount account with the Bank, and a bill running, and one of the parties to the bill fails, the Bank's practice is to return the bill to you, and to call upon you to pay it at once, without waiting until maturity. This no other bank takes upon itself to do,¹ the practice being, in fact, wholly in excess of any legal rights belonging to the holder of a bill of exchange.

The subject of bill-broking is so closely connected with banking business that it is impossible to avoid saying a word or two on it. An attempt has already been made to convey some notion of the enormous sums with which the great banking interest of this country is intrusted. Here is an account of the deposits held by the undermentioned London joint-stock banks at the latter end of 1857, with the dates of their respective commencement of business:²—

London and Westminster, - - - -	£13,889,021	..	1834
London Joint-Stock, - - - -	10,737,580	..	1837
Union, - - - -	10,874,640	..	1840
Commercial, - - - -	936,724	..	1841
London and County, - - - -	3,533,425	..	1838
City, - - - -	1,388,983	..	1856
Bank of London, - - - -	1,114,846	..	1857
Unity, - - - -	117,380	..	1857

£42,592,549

¹ Evid. of Mr. Neave—Evid., p. 16, Q. 223 ; see also Evid., p. 81, Q. 1266, 1267.

² Evid., p. 70.

There are also the sums deposited in the other joint-stock banks and private banks of London and the country, the bulk of all which is to be turned to profit in some way or other. To effect this the agency of bill-brokers is employed to a great extent, and the practice of so employing them has much grown of late years; for, as larger sums became intrusted to the bankers, the more difficult it became for them to find discounts enough for themselves, and they resorted to bill-brokers, a class who were *in their origin* merely what their name imports—the agents for bringing together holders of bills, and persons who were willing to discount bills. About fifty years ago the business of bill-broking began to assume its present character, the principal feature in which is, that the bill-brokers discount themselves, and have become the great medium for the transmission of the spare capital of one part of the country to another part where it is more required. Thus the bankers of the rural districts, where capital is not much in request, send their money up to the London brokers to be used at interest, and with this money the brokers discount the bills sent up to them for that purpose by the bankers, and sometimes the merchants and others, of the manufacturing and mining districts, and the great centres of industry and commerce. The commercial classes of London are also supplied by these brokers with money on discounts, to which, otherwise, they would have no ready access. The feature of the system, to which, however, we have at present principally to direct attention, is, that the London and provincial bankers were much in the habit of depositing largely the money intrusted to them by their customers, with the bill-brokers at interest, but also on call; and the bill-brokers were enabled, without keeping any reserve of their own, and in some cases without, in fact, possessing any capital of their own, to meet all these immense liabilities, by the operation of a system which had been in existence since the year 1830; and by which the Bank of England had been in the habit of allowing them accommodation to any extent, by way of loan or advance upon the security of good bills lodged by them in the Bank. The extent of these trans-

actions may be in some degree estimated by considering that, during the monetary pressure of the year 1857, the loans and advances of the Bank of England rose from 10 millions sterling, on October 24, to upwards of 20 millions sterling, on November 21; and that half of that latter amount consisted of accommodation to bill-brokers.¹ During this year, one or two bill-broking houses stopped payment; the liabilities of one of which is stated to have been no less than £5,442,285.² The reader must, however, carefully bear in mind this—it has not as yet been made to appear that these failures arose from any other cause than the misconduct of the individuals concerned in the management of the business. There is nothing brought to light pointing to the conclusion that such consequences necessarily flow from the system itself. At any rate, the system is now materially altered, as the Bank of England, in the course of last year, closed their discount accounts with bill-brokers, who can, therefore, no longer look to the Bank for assistance, but must depend in future on resources of their own; their dealings with the Bank being now confined to the usual quarterly advances. It will be understood that, when we spoke of the bankers depositing money with the bill-brokers on call, it was not intended to convey that the money was intrusted to them without security. The banker so depositing always receives bills having some time to run, or other security, to an amount sufficient to cover the sum he deposits, and which, of course, were returned to the bill-broker by the banker when he calls back his money. The business of a bill-broker is one which has for its object the convenience of bankers who employ their deposits at call, and the convenience of the public who receive discounts by these means; and it is found that the wants of the public for discount are about equal to the money seeking employment from day to day. The two demands nearly balance one another; and these two demands being in existence, the practical question is, whether the balance of them

¹ Mr. Neave's Evid. Evid., p. 25; Q. 377, 379.

² Logic of Banking, p. 574; and see Evid., p. 132.

shall be effected by the bankers or by the intervention of bill-brokers? and probably the new rule adopted by the Bank of England will have the effect, at least for some time to come, of throwing more business into the hands of the London joint-stock banks.

We will next advert to the practice of the re-discounting of bills, against which so much has been said in condemnation. This practice ought to be clearly distinguished from one to which its name is often most idly and improperly given. If a person obtains a loan, offering as security a parcel of bills of exchange, to an amount sufficient to cover the loan which he has obtained by discounting them, and which bills are to be returned to him if he repays the sum advanced before their maturity, but if not, the proceeds are to be received by the lender and holder of the bills as they arrive at maturity, and the offer is accepted; this is an advance upon the security of bills of exchange, but it is not a re-discount, because the borrower does not place his name on the bills, and does not make himself liable upon them. A re-discount takes place when a person who has already discounted a bill for A, takes the bill to B, and gets him to discount it again, A, as owner of the bill, placing his name upon it, for security to B in the transaction. The London joint-stock banks, it is said, never re-discount in the proper sense.¹ One of the charges made against the bill-brokers, before the committee of last year, was founded on their excessive re-discounts. They were in the habit, it was alleged, of recklessly re-discounting bills discounted by the provincial joint-stock banks, and transmitted by them for re-discount in London, and of re-discounting them solely on the faith of the name of the provincial bank which appeared upon them, and without any regard to the names of the other parties to the bills; and the Borough Bank of Liverpool was said to have had, at the time of its suspension, no less than 2½ millions worth of their discounted bills held in London—paper which they had discounted, with the discredit attaching of having very bad names on it, and which had been

¹ Evid., p. 152, Q. 2245, p. 73, ¶8.

re-discounted. This practice seems to be regarded with much disfavour in the commercial community; but the grounds of objection are not at all clearly disclosed, and on principles of law it does not seem easy to discover any impropriety in it. The question has the appearance solely of one of prudence and knowledge—the elements of decision in all questions of money dealings. It is said to tend to encourage a bad class of bills; that, however, must necessarily be a consequence of the *abuse* of re-discounting—it is not the object of it—it is no necessary part of the business of re-discounting. Yet, before it is abolished, something inherently vicious ought to be stated and proved in this great machine, by the working of which the superabundant capital of the agricultural districts is transferred to the centres of manufacturing, mining, and commercial enterprise. That credit may be abused by the creation of fictitious bills is, no doubt, true, but that such bills occasionally get into circulation is no new discovery; nor is it unlikely that neither brokers nor bankers should be able at all times to detect such impositions; hence, they are sometimes deceived, and suffer loss accordingly. The estimate generally received of the amount of the bills of exchange, existing together at any given time in England, appears to be from two hundred to three hundred millions' worth; therefore, the transactions of this class being so enormous, it is not surprising if there are occasionally losses from imprudence, inadvertence, recklessness, or fraud. The subject of re-discounts by bankers seems very seldom to come before the courts. *Pollard v. Ogden*¹ is, we believe, one of the last cases under this head, and may be referred to for the rights and liabilities of bankers on occasions of this kind. We will close this branch of the subject by stating that, while the inquiry before the committee of last year clearly showed, that the joint-stock banks which have lately stopped payment were brought into that state by misconduct and want of integrity in the persons managing them, and not at all by reason of any defects in the principles on which the system is founded; on the other hand, there appears still to linger in some

¹ 2 ELL. & B., 459.

quarters an indisposition to admit the applicability of the joint-stock principle to the purposes of banking. Sir G. C. Lewis (the late Chancellor of the Exchequer), and one or two of the witnesses, seem to be inclined to think the principle to be much less adapted for banking than for others of the great undertakings in which it has achieved such signal success. On this point it is curious to compare the settled opinion of the father of English political economy¹—"The only trades which," he says, "it seems possible for a joint-stock company to carry on successfully without an exclusive privilege, are those of which all the operations are capable of being reduced to what is called a routine, or to such a uniformity of method as admits of little or no variation. Of this kind is—*First, the banking trade*; secondly, the trade of insurance from fire, and from sea risk, and capture in time of war; thirdly, the trade of making and maintaining a navigable cut or canal; and, fourthly, the similar trade of bringing water for the supply of a great city."

With respect to limited liability in banking, there is not as yet any thing of a useful character to be stated, in the absence of experience. Since the passing of the late act (21 & 22 Vict., c. 91), extending the principle of limitation of liability to banking, too short a time has elapsed to have discovered evidence of its workings. We may, however, observe that very discordant opinions were given by the practical men examined before the committee of last year, as to the merits and claims to public confidence² of limited liability as applied to banking.

The system of open credits, or "foreign banking," as it is termed, deserves some brief notice before we close this article, with the subjects treated in which it has some connection. This system has been much extended of late years in this country, and has led to great abuses, and much loss and disaster. On the continent such business as the following is not considered objectionable, and the persons following it are called *bankers*. Thus A, having his house of business in Paris, draws upon B, his

¹ Wealth of Nations, 3rd Vol., 146. Edit. 1789.

² See Evid., pp. 258, 262, 276, 279, 283, 284, 305.

agent in Hamburg (or wherever it may be), having no assets in B's hands to meet the bill when due, but on the understanding between them that the credit so opened shall be covered by the transmission of bills upon Hamburg, by obtaining the amounts of which, when due, B will be put in funds in time to enable him to provide for the bill drawn upon him. In such case, A is called, on the continent, a banker; when he draws such a bill for any one who wants a bill upon Hamburg, his profit consists in the difference between the price he pays for the bills he buys in the market to remit to the agent, and the sum which he charges on his own draft. The agency house, it will be seen, accepts solely on the faith that remittances of bills will be sent in time, so as to save it from the necessity of making cash advances out of its own funds. A commission is paid to them on the acceptance. Several houses in England were found in 1857, to have engaged largely in this system of open credits with houses in the north of Europe, chiefly in Sweden and Denmark; and those English houses fell in consequence of the remittances not being sent forward in due time.¹ But these English houses were not banking establishments in our sense of the term, and there is no proof of any English bank having ever taken part in this description of business. It is material to observe that the system is not wholly new; exchange operations are as old as commerce—that is, the practice of drawing a bill upon London, and the remittance of a bill from abroad, *at a lower rate of exchange* than that at which the bill on London sells for, and which last meets the other when it becomes due. The difference between the two species of transactions is in the object of the latter, and the mode of remuneration of the operator. On the system, of which so many instances came to light in the failures of 1857, the acceptance is undertaken for the sake of the commission, and not with reference to any action upon the exchanges. The one transaction is looked upon by commercial men here as regular, long custom having established and sanctioned it—the other has, of late, grown up to be an abuse of

¹ See Evid., pp. 112, 116, 119, 121, 130, 158.

great magnitude, until the instances of it have become so numerous as to constitute a public evil. There have been cases in which it was discovered that a certain circle of houses co-operated in this business—one remitting its neighbour's bills upon their agent in London, they, at the same time, drawing bills upon their own agents, and giving them as remittances to the other house, thus acting in a vicious circle, and raising money in the discount market in London. This mode of action is said to have been the principal cause of most, though not all, of the commercial failures of 1857.¹

We must not omit some reference to the banking crisis and commercial panic which occurred in the United States of North America, and particularly among the banks of the State of New York, in 1857. There were in that State, in the beginning of the year, sixty-three banks established in business; of these sixty-two had suspended payment by December. Discounts rose to an unprecedented height; in some extreme cases realizing 20 per cent. Securities generally were much depreciated throughout the States. The prices of produce fell. Cotton fell from 16 cents to 9½ cents. What is described as a general scramble for money took place in the State of New York. The cause assigned is, that the banks above-mentioned had made such large advances, and discounted so freely, that they became alarmed at their own position; and in their struggles to strengthen that position, by curtailing their discounts and refusing the usual facilities to the merchants, and by demanding the repayment of the advances which they had made upon ships and different securities, they caused first great difficulties among the merchants, and later some failures; and this was followed by a general collapse of confidence or panic, and then by a run on the banks. Now, in New York, the system of banking is by law (with the exception of the old corporations whose charters are unexpired) uniform in this respect. Every bank is allowed to issue any amount of notes, provided it first deposits with a Government department State stocks at least to the same amount. Avoiding details, this

¹ See *Wealth of Nations*, Vol. i. p. 465, 471.

is the outline of the plan in use: all the banks are obliged by law to have published weekly (which is done by a Government department) accounts showing the circulation of notes, the quantity of specie held by each bank, the amount of advances, the amount of securities held by each; all the items being stated with great particularity. Moreover, during the previous three or four years the amount of the capital subscribed (as it is termed there) to the banks, had very greatly increased as well as the deposits. Also, what is curious, the panic ceased as soon as the banks suspended payments in cash, yet their notes continued in circulation after the suspension, and were freely taken, notwithstanding the suspension, at little or no discount, and so continued to be taken during the whole period of the suspension; the public being aware, of course, that every note was covered by at least an equal value of Government security, deposited against it in the banking department of the State; so that, although gold was no longer obtainable for the notes when presented for payment at the banks, the value in currency was maintained at par, or very nearly at par, by the general confidence that the means existed for their ultimate realization in the form of gold. It should be mentioned, however, that by an express provision of the law, a priority and preference is given to the note-holder over all the assets, before any other creditor, and that, as it seems, independently of the securities lodged with the Government. These banks were all what are there termed "Subscription Banks;" being, in fact, joint-stock banks, with a paid-up capital, the shareholders' liability being, it seems (but we are not in a position to speak with confidence on this point), limited to the amount of their shares. What we have been enabled to state will suffice to show how far the history of this remarkable panic may be worthy of investigation, with reference to the much-mooted question in this country of how far it is desirable, in reference to our currency, that the banks of issue should be obliged to deposit with the government securities equivalent to their note issues.

There is yet a number of points in and connected with this

topic which, for the present, we must leave untouched, inasmuch as it is impossible to embrace them within the bounds of a single article. Our desire has been rather to endeavour to put before the reader a few of the principal points in the practice and law of banking, than to attempt to frame a compendium of the entire subject.

ART. VIII.—JUDICIAL ANTICIPATION.

THERE are two courses pursued by judges, and even the most eminent have differed in their choice between them. One is, never to interfere during the progress of the cause, unless where it becomes necessary to interpose, either from an appeal made by the counsel, or from some irregularity requiring to be checked. The other is occasionally to state difficulties that may require to be got over, or doubts to be removed; in short, to bring the mind of the judge in contact, possibly in conflict, with that of the advocate, sometimes by starting objections requiring an answer, sometimes by a call for explanations, sometimes by ascertaining the precise drift of the argument or meaning of the narrative. Of the former class of judges, Sir William Grant was the most remarkable instance; and, with all the deference which so high an authority—perhaps of all judicial authorities the highest—naturally commands, we venture to doubt the expediency of the course he pursued, and to prefer the other, provided it be guided and controlled by sound discretion. Manifestly, Sir W. Grant's mode was wholly inapplicable to trials at Common Law, even to arguments in *Banc*, touching what had passed at *Nisi Prius*; and, in a court of the last resort, it would have occasioned great risk of miscarriage, where no error or oversight even could be corrected. But even in the ordinary case of arguments, whether in law or equity, it is manifest that the other is the better, and,

upon the whole, the safer course, although certainly it is, if not carefully guarded, apt to produce evil consequences, of which our present purpose is only to mention one—the chance of the judge committing himself, and throwing out opinions which he ought afterwards to correct. This risk is always so far guarded against as can be done, by stating that the question is put, or the objection made, without any intention of indicating an opinion one way or another. Nevertheless, in some judges at least, there is unavoidably a leaning of opinion betrayed, and therefore they ought to be carefully on their guard against being influenced in their ultimate decision, by a feeling that they had, to a certain degree, committed themselves. But what we are about to consider is a much more hurtful practice than even the least guarded interlocutory discussion. We allude to the course sometimes pursued of declaring, at the close of the hearing, the impression which has been made, although time is taken for final judgment, on the ground of the case being of great importance, or of considerable difficulty, or it may be on both grounds.

This is a practice, as it seems to us, always to be carefully avoided—we mean, of course, in all cases where there is no desire for further information from the bar, and where the hearing is entirely finished. The ground of our repugnance is obvious: whatever pains the judge may take to state that he has not finally made up his mind, he has so far announced the inclination of his opinion; and this is known to the parties, and to the bar, and very possibly is given in the regular report of the case, almost certainly in the newspaper account of it. Thus, can it be doubted that he will have a bias on his mind, powerful in proportion to his self-esteem? With some judges this may have the effect of making the interval between the prelibation (to use the Roman expression) and the actual judgment, spent not so much in fully examining the merits of the arguments, as in finding reasons for supporting the views thrown out at the close of it. With other judges there may not be the same evil occasioned; but, with almost all, there is a motive allowed to operate wholly foreign to the only one that should prevail—an absolute desire of ascertain-

ing the truth, and doing justice. Judges are men, and subject to human infirmity; and there may always be a disposition to shew that they were not mistaken in their first view of the question, even in those who are the least prone to rely upon their own infallibility. There is a snare laid for them—a pitfall dug, into which they may slide when more or less heedlessly moving onward.

A great judge, one of the greatest that ever presided in the courts of this country—Lord Mansfield—would sometimes, at the close of an argument, break the case, as he said, for the benefit of the student. It may be presumed that he seldom if ever did this where there was any great interest at stake, whether of the parties or of the law, or any material doubt of the ultimate decision. But Lord Mansfield might be safely trusted where most other judges would err, because of his extremely cautious nature, bordering on timidity, and the closeness with which he knew he was watched, both by professional and political jealousy; in so much that a clamour was once raised against him for giving an opinion judicially after hearing the point argued, contrary to one which he had given in advising on a case of a client—most absurdly raised, no doubt, but indicating the kind of eyes that watched him. We refer, of course, to the celebrated case of *Perrin v. Blake*. Other judges of great eminence have sometimes fallen into this reprehensible practice with little or no evil result, as Lord Eldon; but then they who best knew his judicial nature were quite aware that when he discussed the case, as it were, provisionally, and postponed his judgment, he had, on almost every point, made up his mind, and only hesitated about giving forth his decision. There was therefore very little, if any, effect produced by this premature statement, generally of doubts which he little felt, more frequently of criticisms upon the arguments he had heard, in so far as he had given his attention to them. But we speak of the general case, and we feel confident that we have not gone too far in expressing a very decided opinion against the practice.

Nor let it be supposed that, if in consequence of some such premature statement one judge be misled, he can be corrected

by his brethren where there are several, or by the Court of Appeal if he sit alone. A doubt is thus cast upon the soundness of the decision by the needless diversity, or apparent diversity, of opinion, as not unfrequently happened from Lord Kenyon's disregard of the other judges, hardly justified by his great acuteness and the extraordinary quickness of his apprehension. As for proceedings in appeal or error, it is both certain that cases which require it do not always undergo the corrective process, and that one of the evils inseparable from appeal is the tendency which the knowledge of their decisions being subject to it has to make some judges rely upon remediless mischief being thus prevented. Every judge is undeniably bound to decide as if he were certain that his decision must be final.

ART. IX.—THE FAILURE AND FATE OF THE STATUTE LAW COMMISSION.

ON the 10th of February, 1859, Mr. Secretary Walpole announced in the House of Commons the intentions of the government with respect to the Statute Law Commission; and he then took the opportunity of observing, that he thought the commission had given the public "much information," but, on the whole, the government was considering whether the commission might not be stopped for a time.

We presume, then, that the commission is now at an end. Indeed, had the then Home Secretary conveyed the opinion of the government in any but parliamentary language, he might possibly have said, "The government thinks the commission has done nothing; the government does not believe it ever will do any thing; it has cost a great deal of money, and, if not stopped, will cost much more; the Chancellor of the Exchequer grumbles,

and the government is now of opinion, as all the rest of the world has been for years, that the commission had better be abolished at once."

Although "much information" may have been given, yet that information has not led, nor is it likely to lead, to any practical result; and it has been obtained, moreover, at a somewhat too costly price. Every one knows that the Statute Law Commission is (or was, as the case may be) an inefficient body; that it has not done a whit more than any of its predecessors; and that it has benefited no one but Mr. Bellenden Ker (who, during its continuance, has received £1000 sterling per annum) and the draftsmen, who received certain fees for drawing imperfect and useless bills.

The commission, it must be allowed, had enormous difficulties to contend with; but it never set about overcoming them in the right way. The only plea in extenuation which can be urged in its favour is, that this last commission has done no worse than those which preceded it; for not one of the previous attempts to consolidate and revise the statute law of the realm, numerous as those attempts have been, was ever crowned with even partial success. It is a fact, not a little curious, that three centuries ago, with much becoming gravity, a scheme was propounded with the view of attaining the desirable end which we have just seen our dying or dead commission has so miserably failed in. It is worth while to note the history of this early effort, and how it was followed by others.

It was in the reign of Queen Elizabeth,¹ A.D. 1557, that Sir Nicholas Bacon, lord-keeper, drew up a plan for reducing, ordering, and printing the statutes. The heads of his plan are as follows:—"First, where many lawes be made for one thing, the same are to be reduced and established into one lawe, and the former to be abrogated. Item, where there is but one lawe for

¹ The particulars relative to the commissions, &c., prior to that of 1833, are extracted partly from Mr. C. P. Cooper's "Account of the most important Public Records of Great Britain," &c., and partly from the report of the Commissioners of 1833.

one thing, that these lawes are to remain in case as they be. Item, that all the actes be digested into titles, and printed according to the abrdgment of the statutes. Item, where part of one acte standeth in force and another part abrogated, there should be no more printed, but that that standeth in force. The doeing of these things maie be committed to the persons hereunder written, if it shall so please her Majestie and her counsell, and daye wolde be given to the committees until the first daie of Michaelmas Terme next coming for the doing of this, and then they are to declare their doings, to be considered of by such persons as it shall please her Majestie to appoint." A list of twenty committees, each consisting of four persons, is then given, and to each committee it is proposed that a division of the statutes should be referred. The subject, so far as related to the penal laws, was again taken into consideration in the years 1585, 1593, 1597, and 1601, but none of these efforts led to any result.

The next step was taken by James I., who, upon his accession to the throne of England, recommended to parliament a reform of all the statute law, and particularly of the penal laws. In 1610, the House of Commons, in their treaty with this king for the abolition of the Court of Wards, made it a part of their claim, "that all penal statutes be surveyed; such as are obsolete and useless repealed; and such as are profitable concerning one matter may, for the better ease and certainty of the subject, be reduced into one statute, to be passed in parliament."¹ In the same reign, Sir Francis Bacon, Lord Chief-Justice Hobart, Serjeant Finch, Noye, and others, by the king's command, made considerable progress in reforming and recompiling the statute law; but it is supposed that the distractions of the government in what related to parliament, caused the failure of those measures.

During the Commonwealth the matter was resumed. In 1650 a committee was named "to revise all former statutes and ordinances now in force, and consider as well which are fit to be continued, altered, or repealed, as how the same may be reduced into a compendious way and exact method, for the more ease and

¹ See History of England, Cabt. Cycl., vol. iv., p. 214.

clearer understanding of the people." And the committee was empowered "to advise with the judges, and to send for and to employ and call to their assistance therein, any other persons whom they should think fit, for the better effecting thereof; and to prepare the same for the further consideration of the House, and to make report thereof." No such report, however, is extant. In 1651-52, Matthew Hale (afterwards Lord Chief-Justice), Cooper (afterwards Lord Shaftesbury), and Rushworth, with other persons out of the House, were appointed to report upon the inconveniences of the law; and a revised system of the law was reported to the House in the same year. The work was afterwards transferred to other hands, but was not abandoned; and, in 1653, a committee was appointed to consider of a new model or body of law. No proceedings of this committee have been discovered.

After the Restoration, namely, in 1666, a committee, consisting of Finch (afterwards Lord Nottingham), Maynard, Atkins, Prynne, and others, was appointed "to confer with such of the lords, the judges, and other persons of the long robe who have already taken pains and made progress in perusing the statute laws; and to consider of repealing such former statute laws as they shall find necessary to be repealed; and of expedients for reducing all statute laws of one nature, under such a method and head as may conduce to the more ready understanding and better execution of such laws." This attempt was as ineffectual as all former ones.

There now appears to have been a pause for some years, but in 1796 and 1803 reference seems to have been made to the subject in the reports on the Promulgation of the Statutes, and on temporary laws.

In 1806 the Commissioners on Public Records resolved, "That Francis Hargrave, Esquire, should be requested to consider and report to the Board as to the best method of reducing the statute law into a smaller compass and more systematic form, and of revising or amending the same, in the whole or in part; repealing what is obsolete, and consolidating what consists of needless repetition; specifying the general heads of the statute law most

necessary to be dealt with in either way; the best method of rendering the style of our future statutes more correct, concise, and uniform in their forms of expression, and, at the same time, more perspicuous in the arrangement of their enactments and provisions; with a statement of such practical rules as appear to be most effectual for this purpose." Mr. Hargrave did not make any report on the subject; but the Commissioners of 1833 say that this very learned gentleman is supposed to have made considerable collections towards enabling him to perform the task so "judiciously" intrusted to him. Judging from the result, it might be doubted whether the selection of Mr. Hargrave was so judicious as the Commissioners of 1833 seem to have thought.

In 1816, the Lords and Commons resolved that it was highly expedient that effectual measures should be taken for the arrangement of the statute law under distinct heads; but this again led to no result. Then came the Commissions of 1833 and 1845 for the consolidation of the criminal law, and generally for inquiring into the expediency of consolidating other branches of the statute law; these two commissions absorbed between them about £50,000 of the public money, but did little else.

In the beginning of the year 1853, Lord Chancellor Cranworth announced in the House of Lords that the consolidation of the statutes was forthwith to be proceeded with under his own immediate superintendence. Royal and Parliamentary statute commissions and committees had failed; the Lord Chancellor would now try what a working statute board, nominated by himself, could do. Accordingly, he obtained the services of Mr. Bellenden Ker as head of the board, at a comfortable salary of £1000, and of four other gentlemen as assistants, at salaries of £600 each. The board was but an experimental one; its labours were confined to so much as could be done in one year, and the several appointments were expressly limited to that period. The scheme, however, never had the confidence of the profession nor of the public, and it turned out, as it was evident to all but the chancellor and the chief commissioner it must turn out, a signal failure.

Lord Cranworth's experimental board was thereupon superseded by the present, or, as we hope we must now call it, the *late* Statute Law Commission. This commission was issued on the 22nd August, 1854, for two purposes; first, for consolidating the statute laws of the realm, or such parts of them as the commissioners might find capable of being usefully and conveniently consolidated, combining with that process, if thought advisable, the incorporation of any parts of the common law; and secondly, for suggesting rules to ensure simplicity and uniformity in future statutes.

The commissioners appointed were, the Lord Chancellor, Lords Lyndhurst, Brougham, and Wrottesley; the chiefs of the Queen's Bench, Common Pleas, and Exchequer; Baron Parke, Vice-Chancellor Page Wood, Mr. Walpole, Mr. Napier; the law-officers of the crown for England, Scotland, and Ireland; and Mr. Bellenden Ker as paid commissioner. To these were added, by a second commission, dated the 15th of December in the same year, Mr. Coulson, the standing counsel to the Home Office; and by a third commission, dated the 6th February 1856, Mr. Baines, Mr. J. D. Fitzgerald (then solicitor-general for Ireland), Mr. Maitland (then solicitor-general for Scotland), and Sir Fitzroy Kelly. Lord Stanley, Mr. Greaves, Mr. Stuart Wortley, Sir H. S. Keating, and Lord John Russell, also joined the Board at various times.

Here, then, was a goodly array of commissioners, from whose labours much might be expected; but, unfortunately, it is one thing to name commissioners, and another to persuade them to meet and work. The board met for the first time on the 13th November, 1854, and from that day up to the 9th December, 1857, both inclusive, there were altogether but forty-eight meetings. The minutes of the proceedings of the commissioners during these forty-eight meetings are published, but we believe that the subsequent minutes are not; at any rate, the period between the first and forty-eighth meetings may fairly be taken as the working period of the board. From six to seven members, on an average, attended each meeting; and the following table,

which we have compiled from the published minutes, will show the number of times each member of the commission attended the board from the time of his joining it:—

NUMBER OF MEETINGS ATTENDED					
	From Nov. 13 to Nov. 29, 1854, both inclusive.	From Dec. 13, 1854, to Nov. 7, 1855, Both inclusive.	From Jan. 24, 1856, to Dec. 9, 1857, both inclusive.		
Commissioners appointed 23d Aug. 1854.	Out of 2.	Out of 11.	Out of 24.		
The Lord Chancellor	- 2	- 8	- 26		
Lord Lyndhurst	- —	- 3	- —		
Lord Brougham	- —	- 4	- —		
Lord Wrottesley	- 3	- 8	- 17		
The Lord Chief-Justice	2	- 4	- 3		
Lord Chief-Justice Jervis	2	- 5	- 6		
The Lord Chief Baron	1	- —	- —		
Baron Parke	- 2	- 4	- 13		
Mr. Moncrieff	- —	- 1	- 2		
Mr. Walpole	- 3	- 6	- 8		
Mr. Napier	- —	- —	- —		
Vice-Chancellor Wood	3	- 8	- 24		
Sir A. E. Cockburn	- 2	- 3	- 3		
Sir R. Bethell	- 1	- 3	- 6		
Mr. Brewster	- —	- 1	- —		
Mr. Keogh	- —	- 1	- 1		
Mr. Craufurd	- —	- —	- —		
Mr. Bellenden Ker	- 3	- 11	- 34		
Additional Commissioner appointed 15th Dec. 1854.					
Mr. Coulson	- —	- 8	- 30		
Additional Commissioners appointed 6th Feb. 1856.					
Mr. Baines	- —	- —	- 10		
Mr. J. D. Fitzgerald	- —	- —	- 8		
Mr. Maitland	- —	- —	- —		
Sir Fitzroy Kelly	- —	- —	- 27		

Lord Stanley and Mr. Greaves took their seats at the board for the first time on the 4th of June, 1856; the former attended ten, and the latter twenty-one, out of twenty-four of its meetings. Mr. Stuart Wortley, Sir H. S. Keating, and Lord J. Russell, who severally joined the board still later, had no opportunity of displaying their diligence.

From these particulars it is clear that the board comprised but few really working members, and Lord Cranworth, it must be

said, anticipated that this would be the case ; for, in a paper which his lordship caused to be distributed among the commissioners before their first meeting, it was suggested for consideration whether it would not be expedient to name a permanent committee of members, whose attendance, it was probable, could be obtained, and who should carry out, in detail, the resolutions of the general board.

The board, however, adopted a somewhat different course. The members divided into a number of sub-committees, each of which undertook to superintend the consolidation of a particular branch of statute law. For instance, Chief Justice Jervis and Baron Parke (with whom Sir Fitzroy Kelly and Mr. Greaves were subsequently joined) agreed to take the criminal law ; Vice-Chancellor Wood, Mr. Walpole, and Mr. Ker, agreed to take real property ; Lord Campbell and the Lord Chief Baron agreed to superintend a consolidated bill on the law of masters and workmen ; Sir A. E. Cockburn, in the first instance, and afterwards Sir R. Bethell, took the subject of insurance, and so on. This arrangement, excellent as it may seem, did not work well. We cannot suppose that the members of the sub-committees were incompetent to perform the tasks which they agreed to undertake, but we suspect that they did not apply themselves very vigorously to them. Indeed, we find that just one year after the Lord Chief Justice and the Lord Chief Baron had undertaken the superintendence of a masters and servants' bill (which it appears had been prepared), the secretary to the board was directed to inquire of their lordships whether they had been able to examine it, and if not, whether they would wish to do so, or would prefer that it should be taken up by some other members of the board. The answer of their lordships is not on the minutes, but nothing more is heard of the bill ; and, with the exception of the sub-committees on criminal law and real property law—which appear to have done something—the sub-committees, as a general rule, did nothing.

Moreover, neither the board nor the sub-committees ever came to a definite conclusion as to the meaning of "consolidation," or

the manner in which consolidation bills should be drawn. At the outset it was determined that groups of statutes should be selected and consolidated into single bills, and certain rules to be observed by draftsmen in the preparation of bills were drawn up, and, after considerable discussion, were settled by the board. The first of these rules is as follows:—"As the immediate object of the commission is only to consolidate, not to amend, the law, the draftsman should consider it his duty, in the absence of special instructions, to present as correctly as possible the effect of the statutes in force, without introducing amendments beyond the correction of clerical errors and omissions, which appear from internal evidence to be unintentional; such amendments of the law as it may appear to him advisable to suggest he should, where practicable, present in a separate form; and, in cases where they are necessarily mixed up with other matter, he should be careful to note what is new." And, in the second rule, the draftsman is told that "it is advisable to repeat exactly the material words of existing statutes, wherever such a course is compatible with concise and effectual consolidation." These rules, however, were not to be considered as absolutely inflexible, where special reasons could be assigned for departing from them; and we presume that some little licence was left to the draftsman as to the wording of the bill.

After the board had proceeded under this system for some few months, down comes Sir A. E. Cockburn (then attorney-general), and objects altogether to the mode of proceeding adopted by the board. He contended that, before the process of consolidation was commenced, the whole body of the law ought to be reviewed and arranged analytically; the parts of it which consisted of statutes should next be placed under their proper heads; and the process of consolidation should then be applied to those parts of the statute law which fall together under that arrangement. The whole operation, said Sir A. E. Cockburn, would thus be performed with regularity and system, and should be laid before parliament, not in detached portions, but as a complete work. He thought that, if it was shown that it was a mere consolidation, and that it was carefully executed on fixed principles,

the bulk of the work would not be an obstacle to passing the whole through parliament at once.

Sir Richard Bethell, who then occupied the "subordinate situation" of solicitor-general, followed on the same side, and was in favour of commencing with an analytical arrangement of the law; but he further contended, that the process to be applied to the statute law ought not to be a re-writing of the old statutes in a condensed form, but a digest of the existing statutory provisions, without alteration of language, but with explanatory additions where they have been judicially interpreted. A digest of this kind, said this "subordinate" officer of the crown, would admit of the incorporation of the common law wherever advisable, which could not be effected by merely producing aggregations of old statutes in new language.

The Lord Chancellor admitted that some imperfections might result from attempting to consolidate in partial groups, which might be avoided by a preliminary classification of the whole subject; but thought that difficulties of detail would occur under any system, and the most scientific arrangement was not always found the most practically convenient. On the whole, his lordship thought it advisable to commence by attempting what was known to be practicable; well-drawn consolidated acts were admitted to be useful, and were generally regarded with favour; and if the board could produce some good specimens of consolidation, he thought it would gain the confidence of the public, and perhaps be empowered to attempt something on a larger and more scientific scale. After considerable discussion, it was agreed that an analytical arrangement of the statutes, as a guide to the board in the choice of subjects for consolidation, should be prepared, but that the consolidation of separate groups of statutes should be proceeded with.

These discussions were renewed at intervals, and several "conversations" on the subject appear, by the minutes, to have taken place, but for some time they led to no result; and by the first report of the commission, made in July, 1854, it seems that the majority of the commissioners still adhered to the original plan.

Sir A. E. Cockburn, Sir R. Bethell, and Mr. Napier, however, did not append their names to this report.

But the views of the commissioners were modified by degrees. In April, 1856, we find a determination come to that the law on given *subjects*, and not groups of statutes, ought to be consolidated; and that no alteration whatever, except corrections of clerical errors, ought to be made in the law or language of the statutes. Upon this principle it was resolved—that the criminal law, the law of aliens and denizens, the law of carriers, the law of property, &c., should be consolidated; and, at the end of the session of 1856, eight criminal law bills thus prepared were laid on the table of the House of Lords by the Lord Chancellor. During the vacation of 1856, several bills on the law of property were completed under the same system; and on these bills, in December, 1856, Mr. Bellenden Ker made a report, from which we extract the following passages:—

“I have not yet had an opportunity of comparing the drafts with the enactments consolidated; but, assuming that the instructions have been followed, no alteration has been made in the language of the statutes, nor has the effect of any judicial decisions on the language of the statutes been incorporated in the new bills. Although I consider that a consolidation on this principle is essential as a first step, in order to ascertain accurately what is the state of the existing statute law, I would suggest to the board, that perhaps it would be best not to attempt to bring forward any of these bills as complete measures, until this process has been applied to the whole general statute law; for under the system now adopted, of consolidating the law on given subjects, rather than consolidating given groups of statutes, much more difficulty will arise in the process, which in no case can be completed with certainty, until the whole of the law to be consolidated has been exhausted. And I would also submit, that if the effect of judicial decisions on the statutes is not incorporated in these bills, they will be open to the objection, that they do not contain a true representation of the law as it now exists; and I also think that, unless the phraseology of the old acts is made plain and uniform, little real advantage will be gained. Indeed, all the benefit that could be derived from bills drawn on the present system—(namely, providing the public with a synoptical arrangement of the contents of the statute book relating to each subject)—can be attained by simply publishing them in a cheap form, without attempting to pass them through parliament; and such a course would avoid all the difficulties which now suggest themselves, as to the new constructions which might be put on consolidation acts by reason of change in the context,

or in the period of their coming in force, and many other difficulties of detail which occur on examining these bills with any reference to their being passed through parliament."

Then in June, 1857, a report¹ is made by the commission, from which we learn that the commissioners, on revising the Criminal Law bills with a view to their re-introduction into parliament, had been led, at the suggestion of the Lord Chancellor, to modify to a certain extent the views which they entertained when they first gave instructions for their preparation. It now appeared to the commissioners that if the restrictions imposed on draftsmen were relaxed to a moderate extent, the bills would be much more satisfactory; and they proposed that the introduction of these bills, and of *all other* consolidation bills, should be made an opportunity for effecting some improvements in the law at the same time; not such improvements as were the subject of any differences of opinion, or would raise any discussion, but merely such as would remedy accidental defects; for instance, the removal of unnecessary variations between enactments relating to offences of the same nature, which existed in consequence of such enactments having been passed at different times or framed by different persons, the supplying of admitted deficiencies, and the correction of admitted inconveniences.

Shortly after the date of the report the eight Criminal Law bills, revised in the manner indicated, were introduced into parliament. Their sad fate all will recollect. Discussion in the House of Lords was "put down" by the Lord Chancellor, and the bills, after being absurdly hurried through that House in eight days, were rejected by the Commons.

The following is another remarkable instance of indecision on the part of the commissioners. In the report last alluded to they say:—

"The eight Criminal Law bills originally prepared, related to England only, but as we conceived it to be very desirable, if possible, that the law of England and Ireland should be included in the same bills, they were altered under the direction of the attorney-general

¹ The Commissioners made three reports; the one above-mentioned being the *third*. The second report will be noticed presently.

for Ireland, so as to include the Statute Law of Ireland also. The view, however, which we thus obtained of the extent of the difference between the laws of the two countries, led us to the conclusion, that in a consolidation in which no material alterations of the law were to be introduced, it would not be practicable to frame a bill, so as to include the criminal law of the two countries in a satisfactory manner; and though the modification of our plan above spoken of, has led to some change of our views in some instances, we still think that, generally, it would be best that the bills should not, in the first instance, be made to apply to Ireland, and that the law of Ireland should be subsequently consolidated in separate bills."

Now, continued indecision and imbecile vacillation, rash experimentalising and timid retractation, are causes ample enough to explain why any commission should fail in performing any useful duty. The Statute Law Commission, however, has put one thing beyond controversy, which, nevertheless, we think was generally known before. It has established the utter folly of attempting great and important objects with inadequate and unsuitable means. The constitution of the commission rendered it *impossible* that any practical result could be attained. But, on the other hand, it produced this advantage—the government was saved the necessity of finding out what was wanted, and was protected from the consequences of adopting any views or taking any step in any direction. Nor could they be questioned as to what was being done in this important matter; for had they not placed on the commission the *names* of a host of eminent persons?

It was indeed, as our black table above shows, *only names* of men which were used. If it had been desired to draw up a complimentary address, or to compile a body of amusing legal anecdote, such selection of persons might have been more appropriate; but if any thing is clear on the subject (and we now begin to doubt this almost) it is, that the persons intrusted with the business of putting the statute book in order should be working men and lawyers, ready to devote their time and talents to the purpose. The law officers of the Crown, leading Queen's counsel, busy lawyers (in parliament all night and in court all day), judges whose duties are quite sufficient for their energies, bustling politicians, and aged ex-chancellors, are not the men to be appointed

for such work as is wanted. The cant phrase of the "right men in the right places" was never so applicable as here. The numbers in the commission, and its particular composition, as well as the feeble character of certain of the more prominent members (influential from accident of position), are circumstances quite sufficient to explain its impotence. If any did know what was wanted and what to do—most did not.

"In the multitude of counsellors there is wisdom;" but we never heard this quoted to prove that there should be twenty commanders-in-chief on the field of battle, or ten royal academicians to produce one grand portrait, or that harmony is produced by yoking together men of antagonistic principles, or diverse opinions and habits of thought. The commissioners could neither work all together nor in groups, nor indeed in any way. In one word, the individual members of the board were not the right men for the work, and the combined collection proves the utter miscomprehension of the business which those who designed the scheme possessed.

When the common-law procedure of England had to be revised, very different steps were taken. It is true that some of the most sterling and popular men at the bar were appointed on the commission. But these were men who, if they said they would undertake a task, were sure to perform it; and they were not men who had already done their professional work, and achieved their ultimate position. If, instead of Bramwell, Martin, and Willes, we had gone to the most respectable and aged of the judges, ex-chancellors, vice-chancellors, and old masters, and then added a few leaders of the houses of parliament, an overworked attorney-general or solicitor-general, and the ex-officers of the crown, and half-a-dozen more for ornament, and besought them to suggest, frame, and carry out the great reform which, since 1852, has been in operation in Westminster Hall, how would it have fared with our procedure now?

The Statute Law Commission, however, claims the "credit of having actually commenced, and even made an important progress in, a work which others have only recommended." For our part,

we cannot see that these commissioners have done more than the "others" they refer to; these "others," indeed, did recommend that certain steps should be taken; the late commissioners, on the other hand, have so chopped and changed about, that it would be confiding folly to trust to *any* of their recommendations relative to consolidation. Their proceedings, minutes, and weak reports, are a disgrace, not only to the country, but also to every individual member of the commission.

Except for one purpose, it would hardly be necessary to add any remarks to the above statement of the facts, and the sad history of the ridiculous dead mouse which the ancient, fidgety, gossiping midwifery of the statute commissioners produced to the expectant law-reformers. But we know that there is a class of people on whom it is said that all past experience is thrown away. It becomes therefore our duty, as fresh attempts may be made, without reference to the past evil consequences of sham legislation, to consider whether any effectual measures could have been, or can be adopted to purify and simplify the statute book. And here let us say at once, that had Lord Cranworth's original suggestion been adopted, and one small permanent committee been formed, rather than a number of incongruous sub-committees—chips of the body sent out to play with bits of the business—*something* might have been done. Further, if the well-selected members of such a committee had frequently and thoroughly discussed the comparative advantages of the various methods of consolidation, and made up their own minds to some practicable course of proceeding, there might have been some likelihood of the majority of the commissioners confirming the conclusion come to by the committee, and of the crotchets of a minority of the board being disregarded.

But we are by no means advocates of the system of piecemeal consolidation suggested by Lord Cranworth. Such a system would be fraught with danger, inasmuch as statutes, or sections of statutes, bearing on the subject proposed to be treated, might easily be overlooked. We concur in this respect entirely with Sir Richard Bethell, and an analytical arrangement of the whole of

the statute law is, to our mind, absolutely essential before any attempt at legislation could with safety be made. In this arrangement, moreover, we would leave the wording of the statute law untouched; for, before revisions and amendments are proposed, the present state of the statute law ought to be thoroughly ascertained. There would not be any pressing necessity to pass the consolidation bills through parliament; indeed, such a course seems open to the objection put by Mr. Ker. But let us have an "edition" of the statutes compiled on this plan, and published under the authority of a competent commission. This work done, the process of revision and amendment could then be commenced with safety, and with some prospect of success.

But to ensure such success, and confidence in the commission, its proceedings must not be secret. We can conceive nothing more puerile than the desire which the late commissioners, and especially Sir Fitzroy Kelly, so strongly evinced of not disclosing any of the proceedings of the board. Sir Fitzroy Kelly, at one of the meetings, stated that he had caused a bill to be prepared for the repeal of the obsolete acts relating to religion and the church; and that he was ready to communicate the bill to the board, if he could be assured that it would be treated as a private document, and that any motion for its production in the House of Commons would be opposed! Why should not the profession generally have an opportunity of judging of the efficacy of measures of this kind before they are introduced to parliament? Good measures would be approved of by the profession, and would on that account be all the more readily accepted by the legislature; but should they be generally condemned as inefficient, dangerous, or badly executed, parliament would probably be saved the trouble of considering them.

Commissions on the other side of the Atlantic, appointed for similar purposes, are not secret commissions, and we can see no reason why ours should be. The State of New York has for several years been engaged in codifying its laws. Codes of civil and criminal procedure were presented to the legislature of that State in 1850. Mr. Ker says that our system of judicial inter-

pretation of statutes, and interpretation of the law, is so different from the way in which the law is interpreted by the judges in New York, that he is convinced the code of New York would not satisfy our courts here ; and he adds that there is not a line in the code of New York that would not employ the Court of Queen's Bench or the Court of Common Pleas for weeks.—[Minutes of Evidence before Committee of the House of Commons, Q. 343.] We are not now about to enter into any examination of this code, which, deficient as it is in the eyes of Mr. Ker, yet appears to be sufficient for the requirements of the people for whom it was compiled ; but we may, perhaps, learn from them how a commission ought to be formed, and what it ought to do.

The legislature of the State of New York passed an act in 1857, whereby three commissioners, and no more, were appointed to codify the laws of the State not comprised in the codes of civil and criminal procedure ; their duties are defined by the act ; they are appointed for five years, with directions to report progress, from time to time, to the legislature of the State. But what we would particularly draw attention to are the following provisions in the act :—The codes when prepared are to be printed, and distributed among the judges and other competent persons for examination, after which the commissioners are to re-examine their work, to consider all suggestions that may have been made, and to revise the codes accordingly. The codes, as finally agreed upon by the commissioners, are then to be reprinted, and, six months before being presented to the legislature, are to be re-distributed for further examination.¹

Now, why cannot some such system as this be adopted in our own country ? Why cannot we appoint three commissioners instead of twenty ; and, above all, why cannot our commission be as open in its proceedings, as is the American commission ? Our system has failed ; why not try that of the Americans, which has succeeded ? The great lawyers who prepared the real property acts of 1833, were not afraid of submitting their work to the pro-

¹ A notice of the first report of these commissioners will be found in this number amongst the notices of new books.—(Ed.)

fession before they submitted it to parliament, and the consequence is that those acts are excellent specimens of legislation. In those days, however, it was not thought necessary to introduce law reforms for party purposes. At the present day, on the other hand, it would seem as if all measures of this nature are purposely kept secret, in order to afford some member of the government an opportunity of making a brilliant speech, and of eliciting "loud cheers" from the enraptured Commons, and worthless praise from the credulous public.

Sir Fitzroy Kelly, some few weeks before the dissolution of parliament was thought of, told the House of Commons that he "was anxiously and impatiently waiting an opportunity to bring before the House a scheme for the consolidation of the *entire statute law of the United Kingdom*." Sir Fitzroy, on the 14th of April last, found the opportunity he had so long panted for; but "at that period of the session felt compelled to abstain from submitting to the House, and to the country, any lengthened statement of the views of the government on this important question." He, however, laid on the table of the House samples of the bills which he hoped would be introduced in the next session of parliament for the consolidation of the *Criminal Law* of England and Ireland. This is a step in the right direction. Members of the legislature and the legal profession will now be enabled to consider these bills, before any attempt is made to pass them through parliament. But mark how the views of the present government differ from those of the late commission! These new bills not only consolidate, but materially amend, the criminal law of England and Ireland, and *assimilate* the Irish statutes to those of England, a course which the commissioners (and among them Sir Fitzroy Kelly) ultimately determined was *not* advisable.

Sir Fitzroy was understood to say, that what he thus introduced was the first of a series of about one hundred bills now in preparation, which, if they received the sanction of parliament, would consolidate the entire statute law of the united kingdom. We confess we are not over-sanguine as to the result. Governmental departments have not, apparently, any very precise idea of the

meaning of the word "entire." We trust, however, that Sir Fitzroy Kelly's "entire reconstruction" of the Statute book, may not, like Sir John Pakington's "entire reconstruction of the navy," prove —— an "entire" mare's nest.

With regard to the second purpose for which our defunct Statute Commission was issued—namely, the suggestion of rules for ensuring simplicity and uniformity in future statutes—the commissioners are more decided. They devote their second report (dated 5th March, 1856) to this subject, and propose two plans—(1.) the appointment of an officer or board to revise current legislation; and (2.) the classification of the current public general statutes. These plans are entirely independent the one from the other. The first is the more necessary of the two; the second would become necessary if a consolidation of our statute law were effected, for otherwise the confusion in the statute book would, after a lapse of ten or twenty years, be as great as it is now. But there is no reason why the first plan should not be adopted at once.

The necessity for some general and competent supervision over the *details* of current legislation has been abundantly proved. In a letter addressed to Sir James Graham by Lord Brougham, in 1849, the learned lord writes:—

"Our laws are prepared by individuals, or by boards in connection with the government, but there is no communication between those parties from whom the different bills proceed. Hence there is no guarantee whatever against the most manifest inconsistencies in their various provisions. * * * * * Whoever has attended to the manner in which bills are first framed, and then altered during their passage through parliament, must be aware what gross blunders are committed; and that such blunders are inevitable so long as the work is prepared by various unconnected parties, without any superintendence. Thus, it has often been said that the scissors of the draftsman make many a clause, and so does the pen of the amender. Hence, nothing is more common (as lawyers who answer cases well know) than to find one section of a statute referring to something 'as aforesaid,' when nothing of the kind was said before; but the section had been cut out of a former act in which there had been an antecedent which was not taken. Thus far the scissors, but so too of the pen. I was astonished to find my Patent Bill of 1835, in one or two places made wholly insensible when it was returned

from the Commons. And how? By the members there introducing new matter wholly at variance with the old, which they left unchanged. But though much embarrassment was sure to arise in courts of law and equity from this blunder, I was forced to submit on pain of losing the bill. In 1834 I was compelled to alter a clause sent up from the Commons, which would have suspended all the criminal justice of the country from the next October sessions. The Commons were angry at their blunder being detected, and threw out the bill, depriving the country of a very valuable measure; for such it was, all except that erroneous portion."

The commissioners consider that the chief cause of confusion in current legislation is the way in which hasty and inconsistent amendments, ill-assorting with the rest of the measure, are made while the bill is going through committee; the promoter of the bill often assenting to changes of which he does not approve, for the sake of averting opposition. The commissioners think that an officer or board ready at the right time to give information and point out errors, would be effective in remedying the evils of the present system of legislation, and they recommend the appointment of such an officer or board, with a staff of assistants, whose duty it should be to advise on the legal effect of every bill which either House should think fit to refer to them, and in particular, on the existing state of the law affected by the proposed bill, its language and structure, and its operation on the existing law; also to point out what statutes it repeals or modifies, and whether any statutes, or clauses of statutes on the same subject, are left unrepealed or conflicting.

In February, 1857, this report was referred, by the Lords and Commons, to select committees; but shortly afterwards parliament was dissolved, and the committee was not renewed in the new parliament. Before the dissolution, the Commons' committee reported, but offered no opinion on, the evidence taken before them.

We are not inclined to agree entirely with the commissioners, that the *greatest* risk of defect in legislation arises from the manner in which amendments are admitted in committee of the House. We agree rather with Mr. Coulson, the eminent counsel to the Home Office, who said, "It is a *considerable* risk, and it

certainly is convenient for *framers of bills*, at any rate, to adhere to the doctrine that it is the greatest."—[Minutes of Evidence before Com. of House of Com., Q. 50.] Doubtless errors do often occur from the insertion of ill-considered amendments; but the chief cause of error in our disgraceful legislation is careless and indifferent drafting, and we undertake for every blunder made by an amender, to point out at least ten made by a draftsman. The following are a few amusing specimens of carelessness on the part of each:—

The Act of 1845, to amend the law of real property, enacts that a *lease*, required by law to be in writing, and a surrender in writing, shall be void at law unless made by deed. A proviso, inserted by some member who thought this enactment ought not to apply to Ireland, ran thus:—"Provided always that the said enactment, so far as the same relates to a *release* or a surrender, shall not extend to Ireland" (8 & 9 Vict., c. 106, s. 3).

In 1850 an act relating to piratical ships was passed. It was intended to come into operation on the 1st of June, 1850; but it unfortunately happened that the act received the royal assent on the 25th of June, 1850, and the draftsman had provided that it should come into operation on the 1st of June next. A second act, to remedy the error, was passed immediately after the first (13 & 14 Vict., cc. 26 & 27).

In 1853, a government act relating to assessed taxes was passed, by which the duties then payable were repealed, and the duties set forth in several schedules were intended to be granted in lieu of the repealed duties. It so happened, however, that the draftsman, in granting to her Majesty the duties mentioned in the schedules, omitted noticing one of these schedules which comprised the duties payable in respect of certain horses and mules, and consequently none were payable for those animals. This act was amended in the next session (16 & 17 Vict., c. 90; and 17 Vict., c. 1).

The County-Court act of 1856 provided that certain judges, mentioned in a schedule, should receive the salaries set opposite to their names in that schedule; but opposite the names of Mr.

Falconer, judge of the county courts of Brecknockshire, and Mr. Yates, judge of the county courts of Cheshire, there were *blanks* (19 & 20 Vict., c. 108, s. 81).

An error of a somewhat more serious nature occurred in the act 9 Geo. IV., c. 55, which consolidated the laws in Ireland relating to larceny. The 46th section of that act recites, that a failure of justice arises from the subtle distinction between larceny and fraud, and enacts that the obtaining of property by any false pretence, and with intent to defraud, shall be treated as a misdemeanour. Then follows the following proviso:—"Provided always, that if, upon the trial of any person indicted for such misdemeanour, it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, *he shall by reason thereof be entitled to be acquitted of such misdemeanour.*" Six years after the passing of this act, it was amended by the 5 & 6 Will. IV., c. 34, which enacted that the act in question should be construed as if the word "not" had been originally inserted between the words "shall" and "by." Is it possible to imagine any thing more careless than the mistake, or more clumsy than the amendment?

It was reserved for Lord Palmerston, in his gay and cheerful manner, to call the attention of the House, a year or two ago, to a bill in which, by a grammatical error, the case of Good Friday falling on a Sunday was carefully and religiously provided for!

But it is in the composition of "titles" and "short titles" to acts that the draftsman usually displays his ingenuity, the flexibility of the English language, and his philological learning. How marvellously happy are some of the curious combinations we find spread over the statute book! For instance, "The Companies Clauses Consolidation Act, 1845," is a combination of words which is surpassed only by that in the title, "Lands Clauses Consolidation Scotland Act, 1845." Then again, "An Act to amend the Smoke Nuisance Abatement Metropolis Act, 1853," is an elegant, though not purporting to be a "short" title. "The Dublin and other Roads Turnpikes Abolition Act, 1855," is very good; but there are two specimens quoted by the com-

missioners as being "very unlike pure English," which far excel any we have yet mentioned; these are, "The Metropolitan Improvements Repayment out of Consolidated Fund Act 1853," and "The Great Southern and Western Railway Ireland Extension Portarlinton to Tullamore Act 1847."

These specimens are taken quite at random; hosts of titles of a similar nature may easily be found. In the last session a bill was introduced "To amend the *drafts* on the Bankers' Law Amendment Act, by repealing the fourth clause of the said act;" and an act was passed, the short title to which is, as observed by Mr. Toulmin Smith in his useful "Parliamentary Remembrancer," a curious misnomer. The act in question repeals the acts ordering certain days to be kept, one with fasting and humiliation, and the others with thanksgiving; but these acts did not require, or even authorize, any peculiar forms of prayer, and yet the repealing act has for its short title, "The Occasional Forms of Prayer Act!"

Three years have now elapsed since the commissioners advised the appointment of a revising officer or board; but their advice has received no attention beyond that which we have already mentioned. There appear to be difficulties in the way; some think parliament would be delegating its powers by allowing any officer or board to meddle with the wording of a bill. Others, again, think that a large staff of assistants would be required, who would have enough to do during the sitting of parliament, but who would be idle during the rest of the year; and the chancellor of the exchequer, no doubt, thinks of the expense. On the other hand, it is urged that private bills are now submitted to standing committees; that the chairmen have their counsel who advise them; and therefore there can be no reason why public bills should not be submitted to similar standing committees, or why the chairmen of these committees should not be advised by the proposed officer.

There cannot be any objection to this mode of proceeding, and, the fear of expense ought not to deter parliament from taking this matter seriously into consideration. To a country like ours, a few thousands a year expended with the view of attaining something

like sensible legislation, are unworthy of consideration; and we trust that in the grand scheme for consolidation, which we are led to expect will be completely unfolded in the next session of parliament, current legislation will not be forgotten.

One word more: Mr. Bellenden Ker, in his evidence before the committee of the House, expressed his horror at the very notion of a revising *board*. We have as much horror of boards as Mr. Ker; but how is it that the commissioners, in so very simple a question as this, could not decide whether the revision of bills ought to be intrusted to a single officer or to a board? Why did these twenty learned men leave this knotty point still to be decided by Her Most Gracious Majesty, whom they were called upon to advise? To the indecision of the commissioners on this, as on all other points, may principally be attributed the neglect with which their second report (the best of the three) has been treated, the indifference and incredulity with which proposed future efforts are now met, and the discredit to which this important branch of law reform has unhappily attained.

ART. X.—*On Poisons, in relation to Medical Jurisprudence and Medicine.* By ALFRED SWAINE TAYLOR, M.D., &c. Second Edition. London: Churchill. 1859.

SOME of our readers might suppose that the word *Poison* was so clear in its meaning that no difficulty would arise from its use in common or scientific language. And yet so far is this from being the case, that we have never seen an adequate definition of the word. M. Bernard (in his "*Leçons sur les Effets des Substances Toxiques*,") says, a correct definition is impossible; but adds, that here, as in other instances where definition is most difficult, it is least requisite. The like reflection may have consoled Dr. Johnson when he asked the pert midshipman what "poplolly" was, and obtained for reply, that

it was "what the poplolly man put into the poplolly locker." The medical practitioner at least will be aware that the same incapacity for definition belongs to the word "medicine." "No one," says Dr. Taylor, "can draw a definite boundary between a poison and a medicine"—a fact to which they who have been much physicked can give ready credence. The greater number of poisons are useful medicines when properly employed, and "nearly every substance in the catalogue of medicine may be converted into an instrument of death, if improperly administered." The old proverb, indeed, that "what is one man's meat is another's poison," also confirms this view.

The popular notion of a poison is obviously too imperfect for scientific consideration; for that is commonly supposed to be a poison which, when administered in *small quantity*, tends to destroy life or health. However, a small dose of certain substances—for instance, tartarized antimony—is a *medicine*, while it is a poison when a *large* dose is administered. Let us take another instance—that of common salt. In the small doses in which we all indulge, this substance is a food, and one which it would be cruel persecution to deprive us of; but if, like a self-doctoring young lady whose case is recorded, we were to swallow half-a-pound thereof, in a few hours later the coroner would sit on our bodies, and our heirs, executors, administrators, or creditors, as the case may be, would enter upon our estates.

The nature of various substances, in a toxicological point of view, and the loose use of the term poison generally, is of no small practical importance. It is by no means uncommon for the counsel for the defence, in a charge of poisoning, in the cross-examination of a medical witness, to press upon him the question whether the material alleged to have been fatally used was strictly poison. Thus, in a case mentioned by Dr. Taylor, a woman named Whisker administered to a female, for a specific purpose, some white hellebore. Now this vegetable one medical witness hesitated to rank as a poison, because, though it was noxious to the human system, he knew of no case where it had

produced death! So an objection was taken to the indictment that hellebore was not poison. The judge thereupon is reported to have laid down the law to the jury, that what was in ordinary language understood to be a poison, was to be legally held to be such. The jury very properly found that white hellebore was a poison, and the prisoner was convicted. Thus, although it is a question for the jury to consider as to whether a particular drug or other substance is a poison, yet their verdict must be derived from the medical evidence. The mere question of a poison or medicine, may be illustrated by the case of a wretched woman called Rodanbosh, who, in 1856, was indicted for administering oil of turpentine to her infant. The defence was, that she thought it would cure its cough!—probably just as the guillotine is said to be a perfect remedy for squinting. Here the jury acquitted the prisoner. Again, in another case, emanating from that great poisoning county Essex, a woman escaped conviction because white precipitate was not proved on the trial to be a “poison or destructive thing,” although it undoubtedly is both.

Although, as we have seen, it will be occasionally difficult for a medical man to say, abstractedly, that a certain drug or substance is poison, yet he will surely find it impossible to affirm that such has or has not “poisoned” a particular individual, or been destructive of his life. Thus, certain metals are not “poison”—iron or silver, for example; yet their introduction into the human body may be very “destructive to life.” One recent instance is on record (Med. Soc., Lond., 1856), where a greedy boy, having been told to “take a spoon,” did so—by swallowing a silver one seven inches long. Although, on all surgical grounds, this *enfant terrible* ought to have died, yet his life was preserved, and he was enabled, after a lapse of two years, honestly to restore to his anxious parents’ plate-basket the article he had thus curiously appropriated and secreted. This instance ought not to be taken as a precedent for swallowing metal substances indiscriminately; for pieces of metal of much less size and importance are often destructive of life, *e. g.*, copper coin, needles, and pins. The latter are used especially for the

purpose of murdering young children ; and although these articles occasionally fail to effect this object, when the intent to destroy is proved, no doubt can exist but that their administration is felonious. If frequent recovery or instances of non-susceptibility could alter the character of the act of administration of any substance, no doubt the case recorded in the *Medical Gazette* (vol. 26), would have this effect in regard to pins and needles ; for here no less than 254 were removed from a woman's body, most of which had been there some thirteen years. She was fortunate, however, in the *sticking* of her pins, and in the mode in which the needles threaded their ways ; for these useful little implements will sometimes penetrate the liver, carotid artery, or other equally important portion of the human frame. One old woman, for example (also an inhabitant of Essex), administered some pins to her grandchild eleven weeks old, one of which took up its abode altogether in its liver. This would have been fatal to the child, but its grandmother had also taken the precaution of causing it also to swallow some sponge and a piece of wood, to meet the contingency of the pins failing. This excellent woman was tried and acquitted by a Chelmsford jury !

And here we may remark on the vigilance which is requisite for a practitioner, when consulted on mysterious cases which often arise. The most improbable causes may be detected at times by his acuteness, though sometimes he may be utterly baffled. The death of an imbecile girl (reported in the *Dublin Medical Press*) is an instance of a patient puzzling the profession. She became emaciated, vomited, and could take no sustenance, and a tumour was formed in the pit of her stomach. After her death, but not till then, it was discovered that she had acquired a habit of swallowing her own hair, which had collected in her stomach and killed her. In another case (*Philadelphia Medical Examiner*, 1847), dangerous symptoms in a child were long unaccounted for, until it was discovered that the patient had taken a fancy to eat *percussion caps*. We are told, though we can hardly credit it, that "the caps were *discharged* and the child

recovered!"¹ We should have thought that the violent explosions in the child's intestines must have killed it.

The statistics of death by poison in England are derived from the Registrar-general's report, and are very interesting, though evidently imperfect. The average mortality (calculated from 1848 to 1853) amounts to 536 per annum. The death of the males is in great excess over that of the females *every year*, except in 1852, when the proportions are reversed in a manner most extraordinary, and totally unexplained.²

Assuming, with Dr. Taylor, that deaths ensue in not more than one case out of three of poisoning, we have about 1600 known cases of poisoning per annum. The statistics are, as we have said, undoubtedly imperfect; but they contain the best approximation we can arrive at as to the facts which render them useful.

There is another table, derived from the returns of the inquiries held by the coroners of England and Wales, of deaths occurring by poison during the years 1837 and 1838; but this makes it appear that there were about half the number of deaths by poison in 1837 than there were during a like period ten years later—a very improbable condition of circumstances. The coroners' returns, however, are useful as showing the comparative frequency in the use of various poisons. Thus:—

Deaths during two years were occasioned by various					
preparations of opium	-	-	-	-	196
By arsenic	-	-	-	-	185
By sulphuric acid	-	-	-	-	32
By prussic acid	-	-	-	-	27

Hence, to opium we must refer the greater number of fatal poisonings; but of these the larger proportion arise from *suicide* or accident. Arsenic is the next common means of death in

¹ Our contributor's mind must be perversely running on his gun-nipples, or he would perceive that there would be no known means of *firing off* percussion caps so located. He has curiously misunderstood the medical term employed!—(Editor.)

² We assume there is no misprint in the original returns, which are accurately repeated in Dr. Taylor's book.

England, and is the agent most generally employed for felonious purposes.

In France, arsenic is by far the most popular poison : its fatal employment equals that of all the rest put together ; indeed, some authorities say *two-thirds* of the deaths by poison in France are to be attributed to this mineral. Opium seems to be comparatively rarely used by our neighbours for either felonious or suicidal purposes.

In Denmark, the national tendency appears to be towards vitriol—a most frightfully painful mode of exterminating life : it is employed chiefly by suicides and murderers of babies. Arsenic is the next in favour in Denmark.

Another table return gives the astonishing fact, that out of seventy-five cases of poisoning by *opium*, forty-two occurred in children under five years of age ! Indeed, out of deaths from “improper administration of medicine” no less than *three-fourths* befall young children. This is a strong corroboration of a fact well known to medical men—the gross ignorance and stupid cruelty daily exercised upon the infantine world. Mothers and nurses between them destroy, directly and indirectly, a large proportion of the population annually born into the world.

More women commit suicide by poison than men—the proportion being 87 to 74. More men, on the other hand, are, by murder or accident, poisoned—the proportion being 107 to 81. The hospital statistics with regard to poisonings require some explanation, which we hope Dr. Taylor will afford in the next edition of his book ; for we see that of Guy’s *forty per cent.* of the poisoned patients died—*i. e.*; two out of five—whilst at the Birmingham hospital only *eight per cent.*, or one out of twelve, perish ! Not only, however, are statistics, as here and as in various other instances, very anomalous and imperfect ; but a strong impression is left on the mind, that through accident, ignorance, or villany, many cases of poisoning escape investigation and record. A nervous person might well feel alarmed at the perusal of Dr. Taylor’s book. Supposing that he has no malicious person domiciled with him, skilled in the art of despatching foes by the herbs

which grow around, or the drugs of the chemist's shop; yet the common soft water from the leaden cistern, as well as the costly old port-wine (decanted from the bottle whence all the shot had not been taken)—the metal vessels in which his food is cooked¹—the food itself by adulteration or error—the paper which brightens his walls, and the atmosphere which he inhales, may all contain latent weapons for his destruction. Poison, indeed, slays multitudes by modes unknown to themselves and neighbours. Dr. Taylor narrates that he nearly fell a victim to a baker. The morning rolls were observed to have *something green* sticking to the crust. The green was examined—it was only a little of the soft paint that came off from the shelf in the window. This paint on the bread only contained arsenic enough to have made the whole family capital illustrations for a posthumous edition of Dr. Taylor's book on poisons, under the head of accidental poisoning by arsenic.

With the spread of knowledge many accidents and mischiefs may be prevented, as well as many improper suspicions averted. Symptoms are now more generally able to be referred to the causes in operation, and remedies are also better understood than they formerly were. When the use of certain violent drugs was known only to the initiated few, it was possible for them, if diabolically minded, to dispense mysterious deaths without suspicion, or at least free from detection. Brinvilliers ran a successful career of murder, and Anna Maria Zwanziger (whose crimes are recorded by Feuerbach), moving amongst ignorant and unsuspecting families, dealt, for many successive years, murder as she list.

Indeed, there seems to be a stage in the career of the crime of poisoning when the process becomes one of peculiar fascination. It is carried on not merely for revengeful or covetous purposes, but in exercise of a secret power which gratifies the morbid soul

¹ A clerical friend of ours had recently prepared in a copper, during hard times, some extraordinary good soup for the poor. This charity had nearly conducted some two or three score of his parishioners to some one of the other worlds. Simultaneous sickness drew attention to the cause, which was—a *dirty copper*.

of the horrid practitioner. Cases are recorded where the suffering victim is nursed and wept over by the wretch whose hand is daily administering the fatal and agonizing doses. Arsenic Thugs have been far less common than one would suppose; nor can the student of psychology have a more curious subject for his consideration than such an instance of perverted feeling.

The reports from our assizes occasionally contain particulars which, while one is astounded to think that these things can be—this cruelty, cunning, unnatural brutality, hardihood—suggest the unpleasant ideas that a large amount of undetected crime may possibly be committed in the centre of society. An eminent physician of our own days, and of very large practice, has said in relation to domestic crime of the nature we are referring to, not committed among the lower classes, that he only *knew* of two cases among his patients where he believed husbands and wives had poisoned each other. "Foul play" is, however, naturally found more rife among the lower, uneducated, and brutal classes, where life too is held cheap, and where we must fain believe not a few meet their deaths from causes which would admit of painful explanation, but the facts of which are never revealed.

There is one point in Dr. Taylor's book which we cannot help alluding to. We mean the controversial and personal tone which the author falls into too frequently—unless indeed it is unavoidable. In the present state of the practice of experts, and the morale of "professional witnesses," it may be true that an upright and honourable mind cannot avoid taking *every* opportunity of bitterly denouncing the abuse of scientific knowledge, and the disregard of the responsible office of assisting public justice, and securing private rights. Yet we wish the frequency of the attack and exposure of the conduct of certain well-known professional men, were not so perpetually recurring, and so broadly put forth. We are far from saying that the author condemns unfairly; but is it necessary in a standard work to adopt the bitter and pointed language which we are now noticing? We are fully aware of the evils he complains of; indeed, in an article in the *Law Magazine* for August, 1856 ("The Evidence in

Palmer's case"), we have ourselves expressed our opinions strongly with regard to the disreputable mode in which medical evidence is proffered. We there have said—"The witness-box seems to be sought by some as a cheap advertisement, by others as the means of contradicting or discomfiting a rival; but from whatever cause it may arise, the worst danger to the administration of justice, and the greatest injury to the scientific character, will be incurred whenever it shall be known that professional witnesses may be retained to establish indifferently a case for either side. This is no fanciful danger; for we believe that there are few lawyers of considerable practice who could not within their experience give instances of the profligacy with which scientific testimony is tendered, and not in criminal cases only."—(*L. M. & R.*, Vol. I., N. S., p. 349). And again: "That there have been frequent occasions when (to use Lord Campbell's expression) the medical witness is turned into the 'retained advocate' is as true as it is grievous, and when such occasions occur they call for most unrelenting comment."

It is not, therefore, that we do not concur with the author in condemning notorious and scandalous misconduct of so-called scientific "professional" witnesses; but we think, in a standard work like Dr. Taylor's, contemporary culprits need not be so perpetually pilloried. We get tired of perpetually seeing notes of admiration placed after the assertions, doctrines, and imperfections of Dr. Letheby and Mr. Herepath. These seem to be Dr. Taylor's especial aversion, and their inconsistencies are frequent themes of observation. One effect of Dr. Taylor's remarks on this head will be, that every unscrupulous jail attorney or accomplice of felons, who seeks to have a case made out, got up, or carried through, has had plainly indicated to him that there is a market of "scientific evidence," where he can procure the testimony best suited to his wants.

The observations of Dr. Taylor with reference to Palmer's case (and also illustrating the observations we have just made) are well worthy of perusal. He says:—

"That the prisoner was guilty of the foul crime of murdering

his friend, no one who views the whole case apart from pre-judice can entertain a reasonable doubt. A distinguished German who has commented on his trial, expresses his astonishment that any professional men could be found in England, who could stand forward and publicly state on oath that the symptoms under which Cook died might be explained by any form of nervous disease, epilepsy, or angina pectoris (Dr. Husemann in *Reil's Journal*, 1857, 4te Heft, p. 564). It argues but little for the knowledge or moral feelings of medical witnesses, and must shake the confidence of the public, as it has already done to a great extent, in the trustworthiness of medical opinions. Such must be the result when scientific witnesses accept briefs for a defence; when they go into a witness-box believing one thing, and endeavour to lead a jury by their testimony to believe another—when they make themselves advocates, and deal in scientific subtleties, instead of keeping to the plain truth. Such men should be marked by the public, and their efforts at endeavouring to confer impunity on the foulest crimes, and to procure the acquittal of the most atrocious criminals, should be duly noted. The chemical defenders of the culprit Tawell on the 'apple pip' theory (ante, p. 682), were in the foremost rank to defend the culprit Palmer! Fortunately for society their efforts did not prove successful in either case. In the mean time, this pernicious system is a heavy blow and a great discouragement to the detection and exposure of murder by secret poisoning. No man in this country can henceforth venture to denounce a grave crime of this kind, committed by a person of wealth or of social position, without being prepared to incur the most calumnious attacks, and to have his opinions and motives grossly misrepresented. If, after due consideration, he boldly expresses his opinion at an inquest, and persists in it, he is said to be prejudiced; if he hesitates or expresses himself timidly, he is not to be trusted! There is but little protection afforded to a witness by a court of law; the accused person is there the sole object of sympathy and consideration; and a learned counsel is only mildly rebuked, who, against the whole bearing of the scientific evidence, asserts that the prisoner is innocent, and asks

the jury to adopt his venal assertion in preference to the unbiassed opinions of medical men."

Dr. Taylor, in the above passage as elsewhere, is, we believe, justified in the use of most of his expressions; but, notwithstanding all his experience, we perceive that his notion of the duty and position of an advocate in English courts of law, partakes of the error which we commonly find, and expect to find, amongst well-informed people. "Venal assertion" is not the correct term for the language of counsel. Dr. Taylor himself is paid, and properly so, for giving evidence. For his assertions in the witness-box he is remunerated—we might call them venal in the primary sense of the word, as they are in one sense bought; so the arguments and forensic powers, when exercised by counsel, are in like manner venal. The *assertions* of the latter, however, are not venal. They are valueless, and therefore not marketable, unless supported by evidence.

It may be that the principle of advocacy is altogether immoral, and that no one, lawyer or layman, should promote the cause of plaintiff, defendant, prosecutor, or prisoner, until he has first examined the matter, and been persuaded of the *truth* and righteousness of a litigant's cause—i. e., until he has *first* constituted himself judge and jury. But at present it is thought that justice is better secured by allowing advocates on both sides, whose functions shall be distinct from that of the court. Most questions have, as experience shews, at least two sides; and it is better that each side should be presented by a different individual, and be submitted to hostile examination of professed opponents.

To define the limits of the advocate's duty, is almost as difficult as Dr. Taylor finds it to define the limits of the terms poison, or of medicine. These limits are, doubtless, often transgressed by those whose moral sense is blunted; but they are more often wrongly supposed, by the ignorant, vulgar, and prejudiced, to have been transgressed, when, so far from this being the fact, the interests of the client would have been betrayed, and truth sacrificed, if any other course had been pursued. Nor has Dr. Taylor, so far as our personal observation extends, any cause to complain

of his treatment by the bench or bar. He is personally respected, and regard for his merits is shewn in a marked manner. His opinion and statements, wherever we have seen him giving evidence, have been received with the utmost attention. The exactitude, propriety, and pertinence with which he delivers his testimony in a court of justice, awaken the admiration of every body competent to judge of his difficult and responsible duties. He possesses a rare and valuable combination of qualities. To great scientific accomplishments, practical skill, and enlarged experience in delicate chemical analysis, he adds the power of happy expression, and extraordinary ability in conveying to ordinary minds, and the untrained intellects of jurymen, the results of his studies and investigations. Cross-examinations do not seem to ruffle him, nor comment in court to disturb him; and, if we might offer a word of advice to him, it would be not to be chagrined, or exhibit annoyance, after he has left the court, by a recollection of the antagonism or detractation of other and less respectable persons, or by recalling the criticism and observations to which his evidence, like that of all witnesses, must and ought to be exposed.

Although we boast that modern science not only saves the innocent, while it brings the guilty to justice, yet we ought carefully to note what are its capabilities, and where it fails, through the ascertained means and known tests proving ineffective, or through the rashness or vain pretensions displayed by analysts. To be able to discover the four-thousandth part of a grain of strychnine in an ounce of blood, is a *claim*, it would appear, which certain experts have made. The one-thousandth part of a grain, it is conceded, can, under certain circumstances, be detected. But the practical question in medical jurisprudence is, can such an infinitesimal dose be given to a living animal, and can the poison afterwards be separated from the blood? And this is proved to be impossible. A candid expert would draw the distinction between the experiment he makes with the pure poison, and those he tries in seeking small quantities diffused through the dead blood and tissues. There are limits to the amount of scientific knowledge at any particular period, as well as to those of ingenious

experiment; there are none to the dogmatism of vain and unscrupulous men. "By one chemist, strychnine is said to be eliminated in the urine; by another, to be deposited in the flesh and bones; by a third, to remain stationary, so as to be entirely recoverable after having done its work as a poison; and by a fourth, to be speedily thrown out of the system. These inconsistent statements show that there is a total want of uniformity in the results obtained by the different analysts;" or (we may suggest) of the errors which arise from men allowing theories or hasty conclusions to take the place of practical research. Chemists are sometimes at fault, and cannot explain why very satisfactorily: thus we see a case referred to where an old man had undoubtedly poisoned his grandson by giving him phosphorus paste with his bread and butter, but Mr. Herapath could not find any trace of phosphorus. The following passage is not very consolatory to those who would desire to place implicit confidence in the results of science:—"Men who have shamelessly stated on oath that there is no poison so easy to detect (as strychnine), have, when cases have actually occurred to them, shrunk from the responsibility of testing their theories by facts. With regard to the alkaloid, strychnine itself, among fourteen fatal cases which had occurred up to the time of William Palmer's trial (1856), chemical science was a blank."

In connection with this subject is a remark of Dr. Taylor, which is worthy of consideration. He says—"It cannot be denied that the great facility with which chemical analysis is applied to the detection of most mineral poisons, is due to the ignorance of those who criminally administer them. A mineral poison is frequently given in the form of a loose powder undissolved, and it is then capable of analysis." But the author proceeds to give instances where toxicological science has been brought to bear by the miscreant, so as to baffle the scientific "detective," as the analytical experts are sometimes discourteously called. Dr. Taylor, too, will recollect a case in Essex, where, as it has been alleged, and with great probability, a woman was tried on a charge of poisoning, and being acquitted (though no

doubt guilty), she acquired so much useful knowledge from the evidence of the medical witnesses during the trial relating to the properties and mode of administering of arsenic, that on her liberation she renewed her practice with her fresh information, which, nevertheless, did not avail her altogether, for she was eventually caught, tried, and hanged, as an Essex arsenic poisoner.

With respect to a fallacy often repeated in courts of justice, Dr. Taylor makes some useful remarks. He observes, "that the quantity remaining in the stomach, or the portion of absorbed poison deposited in the tissues, can give no idea of the quantity actually taken by the deceased ; since more or less of the poison may have been removed by violent vomiting and purging, as well as by elimination. But the quantity found free in the stomach and bowels, even after a portion has been thus lost, is often more than sufficient to destroy the life of a human being. It is singular that, notwithstanding the existence of these very obvious and natural causes for the removal of a poison from the stomach, barristers should so frequently address the inquiry to a medical witness, whether the quantity of poison found in the body was sufficient to cause death ? Whether this question be answered in the affirmative or negative, is a matter which, medically speaking, cannot at all affect the case ; since either no traces of poison, or but a very small portion, may be found in the viscera, and yet the deceased may have assuredly died from its effects. Absorbed arsenic, as it exists in the tissues, is never found except in very minute proportion, a proportion commonly insufficient to destroy the life of another. Hence, whether much or little be detected, the object of this question is not very apparent ; since the fact of death having been caused by poison does not, in the least degree, depend upon the precise quantity which happens to remain in a dead body. It has been truly remarked by Orfila, in regard to arsenic, and it equally applies to all poisons, that that portion which is found in the stomach is not that which has caused death, but the surplus of the quantity which has already produced fatal effects by its absorption into the system. The inquiry should therefore be directed to the probable quantity of poison taken, not to how

much remains in the body. This question is one of more importance than may at first sight appear. There is scarcely a trial for criminal poisoning in which it is not put to a medical witness, either by the judge or the counsel, for the prosecution or defence—Supposing poison to be found in the stomach, but not in sufficient quantity to destroy life, is it therefore to be assumed that the person did not die from its effects? This would be equal to laying down the doctrine, in face of the most indisputable evidence to the contrary—that poisons, when taken into the body, are never liable to be expelled by vomiting or purging, or to be removed from the stomach by absorption, and carried out of the body by elimination. The real object of a toxicologist is to discover the poison by clear and undoubted evidence. If more than sufficient to cause death be found in a dead body, then the dose must have been larger than was necessary; but if this proof be always required, what is to become of those cases of criminal poisoning in which the prisoner administers a dose only just sufficient to destroy life; or in which the deceased, by the strength of his constitution, happens to survive the effects for some days or weeks, and ultimately dies of exhaustion? No poison would be detected under these circumstances. Orfila has most completely demonstrated the fallacy of this objection to medical evidence, and the danger of a court of law relying upon it.

“As an illustration of the kind of cross-examination which a medical witness must be prepared to undergo on this question, I subjoin an extract from the report of the trial of *Reg. v. Palmer* (May, 1856). Serjeant Shee, in directing his questions to me, thus deals with the matter:—

“Q. Have you not told me to-day that the quantity of antimony that you found in Cook's body was not sufficient to account for death? A. Perfectly so; but what was found in Cook's body was not all that he took. If a man takes antimony— Q. Do you wish to add to your testimony? A. I do; because I see it is only a little misunderstanding. If a man takes antimony it produces these effects:—first, he vomits, by which some passes out of the body; some may escape by the bowels; there is a

great deal that passes off at once by absorption, and is carried out with the urine. I find by the experiments of Orfila, upon whom we are all inclined to rely, that in from four to seventeen hours antimony is found passing out by the urine. Q. Do you mean on your oath to say, from such traces of antimony as you found in Cook's body, you were justified in stating that your opinion was, that his death may have been caused by antimony? A. Positively and decidedly so; the amount found in his dead body affords not the slightest criterion of what he may have swallowed while living. I have sometimes found in a body less arsenic than would account for death. Q. But, if the amount found is not the slightest criterion of what may have been administered, how does that justify you, as an analytical chemist, in stating your opinion that so small a quantity may have caused death? A. I have not said what quantity may have caused death. I have said a certain quantity was found in his body, which may have been the residue of what had caused death.'

"The fallacies connected with this line of examination must be apparent. In no death from antimony yet recorded, has such a quantity of this substance been found in a body as would suffice to kill another person! When given in divided doses—as the evidence proved that it had been given in the case of Cook—and there has been violent vomiting in the intervals, it is not probable that small doses would accumulate and remain in the stomach and intestines for a week. Such questions, therefore, were only calculated to conceal the truth and mislead the jury.

"The fallacy based on this inquiry is not confined to lawyers. Some medical men, even of good professional standing, have paid so little attention to the subject of toxicology that if the quantity of poison remaining in a dead body were less than that which is usually described as a fatal dose, they would be prepared to say that death was not caused by poison. They expect either that the whole dose swallowed should remain in the body as evidence against the administrator, or that vomiting, purging, and absorption are so nicely adjusted, that, to meet their theory, these functions are wholly arrested when the quantity is reduced to a

minimum fatal dose. The half grain of antimony found in the body of Cook might, however, be taken to represent the residue (at the time of death) of ten, twenty, or one hundred grains of tartar emetic taken during life! In spite of this obvious inference, Serjeant Shee was allowed on this occasion to mystify the facts, and to place the matter before the jury as if the half grain found in the dead body was the whole quantity of antimony that deceased could have taken; and, as this residue did not amount to a fatal dose for another person, it was insufficient to account for the deceased's death! Some of his medical advisers appear to have adopted the same view, since they represented it as a question whether half a grain of antimony could or could not account for the death of the deceased. Either ignorantly or designedly, they entirely overlooked the fact, that there had been severe vomiting at intervals some days before death, and that such vomiting could not take place without the expulsion and loss of a portion of the substance taken" (Pp. 196-8).

An excellent illustration of the important functions which an expert has to perform when civil rights of parties are concerned, is afforded in the case of *Stephens v. Barwell*, which was tried at Wells in the autumn of 1855. The plaintiff complained that the fumes of lead escaping from the chimney of the defendant's works had been deposited on the plaintiff's land, whereby his cattle feeding on its herbage were poisoned. Now, it was admitted that some of the animals *had* died of lead poison. And the question arose, whether the plaintiff's chimney theory was the right one, or whether the poison was derived from another cause. Various circumstances suggested to the acute minds of Mr. Brand and Dr. Taylor, the improbability of the fumes of the chimney being the source of the mischief complained of. Other fields at different and long distances had also bad reputations for cattle being occasionally "moinded;" and, before the defendant's lead-works were erected, it was ascertained that animals had been poisoned in the neighbourhood of the unwholesome fields. Points connected with the locality, and other matter, struck also the observant faculties of the two

scientific gentlemen, that the lead which poisoned the cattle came from some quarter. If it was not deposited by the fumes, could it be taken up by the tissues of the plant? The experts proceeded to examine the facts carefully. They found no lead on the outside of the herbage. A quantity of the grass and shrubs was then dried and burnt, and lead was found in the ashes; and further, the soil was discovered to consist of disintegrated slag of ancient lead-works, and the sediment of the pond water contained silicate of lead and arsenic. The water was free from poison, but the sediment stirred up by the cattle when drinking was impregnated with poison. Soil from the plaintiff's fields was brought up to London, and mustard and cress was sown on this Mendip lead earth and also on common garden mould; lead was found in that grown on the former, and none in the latter. So far for the means adopted by the scientific men acting for the plaintiff. The following paragraph relating to the evidence prepared by the defendant cannot be read without pain:—"As a proof that white lead from the flue was deposited on the surrounding vegetables, a branch of a tree was produced in court, the whole surface of which presented numerous white spots or stains, such as might have resulted from dipping it into the washings of white lead in water. That this had been the mode in which the stains were produced *was rendered highly probable, among other matters, by the curious fact*, that the cut surface of the branch presented in the fresh wood similar white stains! This branch was very judiciously not produced in the evidence, although brought into court apparently for that purpose." The author sums up the result of the trial as follows:—"This case shows that a charge of poisoning cattle may be plausibly made, and even apparently sustained, by pseudo-scientific evidence, when a proper examination of the facts may lead to the conclusion that the charge is wholly unfounded or unproved. As an 'expert,' and well acquainted with this locality, Mr. Herapath might have analysed the soil of the fields, and have tested by experiment the question—Whether growing plants would or would not imbibe lead from the earth? instead of

denying a fact on which he had had no experience. Such an analysis was in every respect necessary, not merely for the sake of public justice; but, if the claim for damages were well-founded, for the interest of the client who retained him. In his evidence he stated that he had analysed the slag of the district, and he found it to contain 36 per cent. of carbonate of lead, the compound which he charged the defendant with diffusing over the plaintiff's grounds. This same slag was plainly visible in the plaintiff's fields, and the result of an analysis might have been unfortunate for his client's claim. Supposing, however, that he had analysed the mould of the field and found no lead, it would have been a strong point in favour of his client. He also stated in his evidence that he had examined the waters of the plaintiff's pond and brook, and found no lead dissolved in them; but he did not examine the sediment, although he very well knew that cattle do not drink filtered water, and that a fine lead sediment diffused through water may be just as poisonous to cattle as lead in a state of solution! The result of this analysis would have probably been highly inconvenient to the plaintiff's interests. In reference to the examination of three or four dead animals, he stated that he had found no lead in the liver! He believed they were poisoned in dry weather by drawing the lead dust through their nostrils into the lungs while pasturing, and in wet weather the lead would pass with the food into the stomach! He did not, however, find any powder or dust in the lungs. He confined his analysis to an examination of the outside of the plants only; he did not examine the tissues of the grass, as acids would act upon and destroy them. He believed that the lead was on the outside of the grass, and had been there deposited from the defendant's flue" (P. 511).

The above case is interesting in another particular, which the author, we believe, has elsewhere ingeniously suggested. The explanation of the phenomenon seems to solve an ancient mystery in a satisfactory manner. The effects of leaden herbage on cattle are such as the witches of old were believed to produce by incantation. Cattle withered away and perished; cows gave no

milk, and goats and sheep were victims of untimely births. These mysterious events occurred in one field and not in another. The old woman, whose evil eyes had rested on the unfortunate cattle, or whose black cat was known to steal wickedly over the impregnated pasture adjoining her cottage, was accordingly, under the sanction of the church, and with the approbation of the bench, and by the authority of the civil power, pricked with pins, drowned, or burnt, as the case may be.

We do not burn witches now. What the processes were by which we consented to abolish this penalty, applicable chiefly to the aged and infirm, a narrow examination of history would enable us to say. But history, if we were to speculate thereon in analogy with our own times and contemporary reforms, we should assume this alteration of the law occurred thus:—The few who had the power of independent thought, and began to disbelieve in witchcraft, were at first suspected of irreligion, disbelief in revelation, and generally accused of heresy and wicked presumption. The influence of the few then extended to a larger body of the public; by various stages the cabinets followed, at first with hesitation, afterwards more confidently; eventually the clerical body, having quoted scripture in support of the portion of their cherished creed till they could quote no longer, surrendered it as untenable, and the spiritual peers thereupon were induced, with many a misgiving and saddened anticipation of the future, to oppose no more, and witches were no longer burned, though the ignorant still held with the doubts of the aged orthodox and learned men who thus yielded their ancient opinions. The “Catholic Emancipation,” the Jew Bill, marriage with a deceased wife’s sister, and the history of other legislative doings, will be found to afford parallels to this our contribution to parliamentary history.

We have said witches are not sent to the stake for exercising their supernatural powers either on animals or human beings. Progress of knowledge has saved them; and we now refer to scientific men to account for certain unexpected events. Strict education, carefully registered observation, and the wondrous discoveries of the

laboratory, are called in aid of justice, civil and criminal. On professional men, therefore, rests the deepest responsibility to clear the innocent from suspicion, and to bring the execution of judgment on the guilty. But it were better to burn witches and drown sorcerers on the ancient grounds of superstition, than to protect the murderer under the pretext of scientific evidence, or to endanger the innocent by wicked neglect or presumptuous ignorance. With an instance of the latter, extracted from Dr. Taylor's excellent treatise, we close our remarks on the subject:—

“A lady, in perfect health, while supping with her husband and family, complained, after having taken two or three mouthfuls, of severe pain in the region of the heart. She fell back in her chair, and died instantly. The parties not having lived on the best terms, the husband was openly accused of having been accessory to the poisoning of his wife—a circumstance which was rendered still more probable in the opinion of his neighbours, by the fact that his wife had lately made a holographic will in his favour. One of his servants, with whom he was said to live in adultery, was arrested, and a *paper containing a white powder* was found in her possession. The husband endeavoured to compromise the affair by offering to give up the will. Here, then, were strong moral presumptions of death from poisoning. Three surgeons (experts!) were appointed to examine the body. They opened the abdomen, and observing some green spots in the stomach (produced, as it afterwards appeared, by imbibition from the gall-bladder), pronounced an opinion that the organ was in a gangrenous state from the effects of some corrosive poison. Some doubt arising on the correctness of this view, four other surgeons were directed to re-examine the body. They found that the stomach had not even been opened, and that its mucous membrane, as well as that of the intestines, was perfectly healthy! It contained a small quantity of undigested food, which was free from any trace of poison. The deceased had died from natural causes. The white powder found in the possession of the servant was nothing more than white sugar. Had the usual effects of poisons been attended to by the parties who were first called to give

evidence in this case, it is obvious that no charge of poisoning could have been made with any shadow of probability" (P. 158).

May not this case, besides its value in demonstrating the danger of loose professional evidence, also suggest to the candid mind the necessity of vigorous cross-examination of experts, when they appear in the witness-box, holding in their hands the life of an unfortunate prisoner?

ART. XI.—THE DIVORCE COURT.

IN our last number we referred to Lord Brougham's statement, laid before the Law Amendment Society, of the great imperfection in the proceedings of this very important tribunal, especially to its want of all security against fraud and collusion. He has since moved for returns in the House of Lords, and given notice of his intention to bring the whole subject of that jurisdiction before their lordships soon after Easter. It is to be presumed that these returns¹ will be in the hands of the profession and the public before the matter is again brought forward; but the subject is of such moment, and so universally interesting to the community at large as well as to lawyers, that we must enter somewhat into the consideration of it now, because, before another number can appear, the question will in all probability have been discussed in parliament.

It must be premised that, when the jurisdiction was vested in the court which had formerly been exercised substantially by the House of Lords, the confident belief was expressed by all friends of the measure, that, as far as possible, the court should guard itself against the risk both of deception and of rashness, and follow, as nearly as might be, the course of the House of Lords in passing divorce bills, supposed to be the most likely mode of gaining this security. The greatest praise is justly to be bestowed upon the eminent judge who has presided over it,

¹ These returns are now ready.

and his diligence has been equalled by his acuteness in the whole conduct of the business ; while the most perfect impartiality not only towards suitors, but towards practitioners, a more rare judicial virtue, has uniformly distinguished him. We may have had occasion to lament his confidence in the kind of procedure to which he has all his life been accustomed ; we may have reasons to question the soundness of the rules to which he has subjected the practice of the court ; but his great talents and exemplary love of justice are beyond all doubt, and what we are about to offer for consideration, rather points to an increase of his authority than any control over it, and rather to obtaining further help for his jurisdiction, than to interfering with it.

The proposal which Lord Brougham submitted to the Law Amendment Society, was for the regular attendance in all divorce cases of the attorney-general, or some one representing him ; and it was believed that some check would thus be given to the frauds of parties. This rule has been adopted by the judicial committee in all cases of extension of patents ; and, although less benefit has been derived from it than might have been expected, this arises from the circumstance, that all, or nearly all, the matters upon which the question of patent extension can turn, are before the court ; whereas many facts may be within the knowledge of persons connected with parties in divorce cases—facts which there can be no means of laying before the court, but which the attorney-general could at once act upon when the information was communicated to him. In the House of Lords, divorces have been often prevented in consequence of suggestions made to individual peers, which led to sifting of the case, brought forward by collusion, and as it were conspiracy, of parties—suggestions which of course cannot be made to the judges of a court. The case has been put (and it is said actually to have existed unknown to the court) of the husband being induced to proceed against the wife, by the paramour offering to pay the expenses. Were the attorney-general in the cause, such a circumstance, of which proof was said to be accessible, would have been brought forward, and at once put an end to the suit. But

all the three parties, husband, wife, paramour, being in league, not a point of the real fact could reach the court.

The act (sects. 29, 30, 31) requires the court to satisfy itself, not only of the facts alleged as grounds of divorce, but that the party petitioning is not excluded from the remedy he seeks by any of the eleven bars, of which four are peremptory, as collusion, condonation, &c., and seven discretionary, as cruelty, misconduct, &c. But the want of adverse counsel, in the great majority of cases, leaves the court without the means of ascertaining how far the party comes under any of these heads; and the course of practice unfortunately established, still further tends to lull suspicion, and to shut out the light. The court requires the petition only to state the facts of the marriage and the adultery, as in a declaration at law. It is of the utmost importance that a full statement of particulars should be given—the ages of the parties, their cohabitation, the separation that may have taken place, with its circumstances, and the origin of the acquaintance with the paramour. The House of Lords had before it all the proceedings in the Ecclesiastical Court, and the notes of the evidence in the action for criminal conversation; and light was thus often shed on the case, so as to create doubt or excite suspicion, and set the House upon making inquiry. In the Divorce Court, a divorce is said to have been more than once obtained where the wife had been married from the stews, or where the parties had never cohabited above a few weeks—not a hint of all this having reached the judges. In one case, the paramour pleaded matters of which he gave no evidence; but the plea set the court upon sifting the petitioner's case, and the divorce was refused. Had the paramour been in league with him, the same facts would have existed, but never could have been suspected, and the marriage would have been dissolved. But had the rules of the court required a full specification of circumstances, in all probability the suspicion would have arisen on the petition. In the House of Lords, the relatives of the parties are often unable to prove such good treatment as entitles the husband to his remedy. It is understood that this inquiry is not regarded as necessary in the Divorce Court.

It appears to us incumbent on Lord Brougham to have a material amendment made in his "Evidence of Parties Act." That important statute has one manifest defect, in the exception of cases of adultery; and there seems no reason for retaining that exception. This improvement of our judicial procedure has had such extensive and such beneficial effects, that there is every reason for desiring its application to proceedings in divorce. The court has the power of examining the petitioner, which the House of Lords had, though seldom exercised. But if the party could tender his own evidence, it is plain that, where he declined doing so, the court would at once have its suspicions awakened. It might also be fit that the wife and the paramour should be examined; and, without such sifting, it is impossible to say that all the means have been taken to demonstrate the case.

One of the most unfortunate things in the proceedings of the court, is the great number of cases in which the whole matter rests upon the verdict of the jury. This is to be regretted on two grounds—first, the subject is, in many cases, partly law and partly fact, as condonation; but next, the case turning upon the verdict, and no new trial ever being granted unless the judge is dissatisfied with that verdict, the practical result is, that unless some suspicious circumstance calls the attention of the full court to the cause, a divorce is granted by a single judge with a jury, and not by the full court. It is observed by Mr. Macqueen, to whose able and learned works, both upon this particular subject and upon the House of Lords' practice the profession is so deeply indebted, that in Scotland, no more than in France, is divorce tried by jury. When that mode of trial, in civil cases, was extended to Scotland nearly fifty years ago, the whole jurisdiction in cases of divorce was left in the hands of the judges; first of the Commissaries, or Ecclesiastical Court, and then of the Court of Session, which has succeeded to their jurisdiction. He adds that there have scarcely ever been appeals from the sentences in these cases.

It is to be regretted that the divorce court should have adopted the rules as to costs of the courts in Doctors' Commons, because some of these rules are very objectionable; as that which enables

a wife to have her costs taxed *de die in diem*, and all proceedings on the husband's part are stayed until he pays. One case is cited in which the wife took out a commission to examine witnesses in Italy. The whole of this was a sham; the bill of costs, however, was no sham; it amounted to £450, which the husband had to pay before he could proceed, the suit being suspended until payment.

We call the attention of our readers to these matters, in the hopes that the whole subject will be fully considered by the legislature early in the next session. We have ever been steady friends of the measure, which vested in a court of law the anomalous jurisdiction before exercised by parliament; but we feel confident that, unless the defects pointed out are removed, and unless some further judicial power is given to the new tribunal, so as to make the full court in practice what the act of 1857 intended it to be, the real authority for examining the case of divorce, and for dissolving marriage, the objections urged against the act will be renewed, with the additional force which experience may be supposed to have given them.

ART. XII.—BANKRUPTCY LAW REFORM.

1. *A Lecture on the Amendment of the Bankruptcy and Insolvency System.* By EDWARD BOND, Solicitor. Leeds: Edward Baines & Sons.
2. *A Letter to the Lord Chancellor, containing Practical Suggestions on the Law of Bankruptcy.* By EDWARD LAWRENCE, Member of the Council of the Incorporated Law Society. London: Hamilton, Adams, & Co.
3. *Articles reprinted from the Solicitors' Journal.* By JOSEPH RAYNER, Solicitor and Secretary to the Huddersfield Chamber of Commerce. London: W. Draper, *Solicitors' Journal* Office.

AT the commencement of the late session, it was announced in the Queen's speech, that a bill would be submitted to

parliament "for assimilating and amending the laws relating to bankruptcy and insolvency;" accordingly, the bill "to amend the law of debtor and creditor, bankruptcy, and insolvency, and execution," was introduced into the Upper House early in the session. We here purpose to refer to sundry points in connection with this bill, as well as to the other bill upon the same subject, introduced by Lord John Russell.

From what has already transpired in parliament, we believe there will be no great difficulty in framing a measure, from the two bills, which will carry out the main objects of both. All parties¹ are agreed upon the propriety of abolishing the distinctions at present existing in the administration of the estates of insolvent traders and non-traders, and of intrusting to the same jurisdiction the administration of the estates of deceased insolvents. There is no great difference of opinion as to the necessity for reducing the expenses—simplifying the procedure—revising the penal clauses, and the provisions regulating private arrangements—nor as to the means of accomplishing these improvements.

Upon two points, however—that of providing further localisation of the jurisdiction, and that of the abolition of the office of official assignee, as it at present exists—considerable conflict of opinion prevails. These two points, it will be observed, are intimately connected with each other; because we apprehend that, if jurisdiction in bankruptcy be conferred upon the County Courts at the option of the creditors, as proposed by Lord John Russell's bill, the present system of official assignees cannot be continued in country cases. It is important, therefore, that we should, in the first place, consider whether the jurisdiction in question is sufficiently localised by means of the existing District Courts, and if not, what is the best mode of providing further localisation.

So long ago as 1852, a bill was introduced by Lord Brougham for abolishing the District Courts, and confining the jurisdiction

¹ There are exceptions to this general statement; not only do certain of those connected with the London Insolvent Debtors' Court (one of whom is assuredly entitled to be heard on the subject) insist on the propriety of preserving the distinction above alluded to; but other competent and independent persons hold the same opinion.—(Ed.)

of the London Court to nine counties nearest to London ; and in a paper of observations in support of this measure, we find a speech of Lord Cottenham, made on moving for a select committee to inquire into the operation of the act by which the District Courts were established, from which it may be useful to extract a few observations. After stating the origin of the bankruptcy laws, and the course of proceeding to make a debtor bankrupt, his lordship observed :—

If the court were 100 miles off, it was obvious that very great expense must be incurred. When the estate was to be seized by means of a messenger, if the court were in the neighbourhood, it was no expense for the messenger to go and possess himself of it ; but if it were situated at any great distance, it was quite obvious that great expense must be incurred by the employment of a messenger for that purpose. The next step was the choice of assignees, who had the duty cast upon them of collecting the estate, and dividing it among the creditors. The assignees were elected by the creditors. And all these things must be attended with great expense, if the place of the bankruptcy was situated at a great distance from the court. If it was in the neighbourhood, it would be easy to manage this business ; but if the persons had to travel to a distance, they would either not go at all, or go at great expense and inconvenience. Another step was the proof of the debts, which must be done by the creditors going before the commissioners in person, or making affidavit. That could not be done without great expense if the court was situated at a distance from the residence of the bankrupt. Again, the realizing of the estate would be difficult and expensive, if the officers must act at a distance from the authority under which they were commissioned. He apprehended no further statement was required to satisfy their lordships that these several duties could not be properly performed except by a jurisdiction near the residence of the bankrupt. From the time of Queen Elizabeth to the close of last session of parliament, this system was adopted. There were no regular courts of bankruptcy except in London, but each case had a court established for the particular purpose of trying it ; and there were courts of commissioners in all the considerable towns of the country, to whom, on a bankruptcy happening in the neighbourhood, authority was deputed by the great seal to do what was necessary to be done for the execution of the bankruptcy laws in that particular case. There were in all about 140 lists of barristers and solicitors, whose courts were held on such occasions as near as possible to the place where the bankrupt lived. The Northampton petition stated that during the year preceding the commissioners had met in no less than 300 courts or places for the purpose of administering the bankruptcy laws.

With reference to the official assignees, his lordship further remarked :—

By the act of last session, the system of official assignees was extended to the country. But suppose the property to be realized lay 50 or 100 miles away from the official assignee, great expense must in that case be incurred, and the estate would derive little benefit from it, the creditors losing the security which it was intended they should derive from the active interference of a well-informed person. So much of the report of 1481 as was adopted, produced the act of last session. By an order in council the London district was greatly extended; in one direction 122 miles, so as to include Yarmouth. He would now state some of the towns that had been deprived of their own courts, and been obliged to go to a considerable distance for all bankruptcy proceedings. Nottingham, with 80,000 inhabitants, had to go 50 miles; Boston, with 14,000 inhabitants, had to go 100 miles; Louth, with 60,000 inhabitants, 90 miles; Yarmouth, with 25,000 inhabitants, 122 miles; and Norwich, with a population of 72,000, 122 miles. From the return of 1841 it appeared that of the fiats sued out, 1,714 were executed in places not now enjoying the benefit of a local court. In 866 of those fiats, the distance the parties would have to go was 40 miles, and in 176 it was as much as 80 miles. The majority of the debts in those fiats was under £10. A petition from Leicester stated the details of five fiats, in which of 213 debts, 117 were under £5, and 75 under £10, and no less than 173 creditors proved in person. In many of those cases the dividend would not pay the expenses of the creditor's journey, and the natural consequence would be, that the system would act as a great discouragement to the creditor troubling himself at all in the matter. Not only had the creditor to make a long journey, and to be at great expense of money, time, and trouble on his own account, but he would often be put to additional expense in taking his witnesses with him, and thus the mere show of opposition might be sufficient to induce an honest creditor to abandon his claim altogether. * * * The official assignee never went at all. What chance was there, under such circumstances, that the estate would ever be properly realized? The books had of course been carried away, and put into the hands of the official assignee. The parties were probably at Yarmouth, the books in London. The messenger was not to go down again without a special order. The agent was probably a common person with little or no information. What, under such circumstances, was to become of the interests of the creditors? The next step was the choice of the assignees. He had already stated, that a large proportion of the creditors had not a sufficient interest to induce them to undertake the trouble and expense. If they resided in the same town in which the court was placed, and if they exercised the right of electing the assignees, no doubt they would look after their own interests, even when the amount was inconsiderable, because they might do so without any material sacrifice of time and trouble. Another point to which it was necessary he should refer was this: It was very desirable that throughout the proceedings the bankrupt should himself be present to explain every point that might appear to be obscure. The official assignee had the books, it was true, but in many cases the

books proved nothing. A question might arise whether a debt that appeared on the books should be sued for or not. Without some explanation from the bankrupt, it might often be impossible to know whether it would be expedient to incur the expense of doing so.

After stating the opinion of Mr. Commissioner Holroyd to the same effect, the observations proceed :—

After this, it cannot be necessary to dwell on the hardship and inconvenience of bringing bankrupts, and creditors, and witnesses up from Norwich, Yarmouth, Northampton, Salisbury, Southampton, &c. to London ; or of these and such places as Leicester, Coventry, Derby, York, Worcester, Chester, Ipswich, Carlisle, Oxford, Cambridge, Shrewsbury, Gloucester, Durham, Lancaster, Stafford, Preston, Huddersfield, Bradford, Wakefield, Lincoln, &c., all of them with judges and court houses of their own, and yet not being able to have their own bankruptcies worked at their own doors. It is true, that since the time of Lord Cottenham's motion the grievance has to some extent been remedied—the Commissioners of the Birmingham Court now hold sittings at Nottingham ; those of the Leeds Court at Hull and Sheffield ; and the Commissioner of the Exeter Court holds sittings at Plymouth—but there can be no good reason why this should not be carried further. Certain it is, that if in 1842 the County Courts had been in existence we should never have heard of these District Courts of Bankruptcy. Most certainly not. Jurisdiction in Bankruptcy would have been given as is proposed by this bill ; and now that we have these courts—have the means, through them, of “administering the law in the immediate neighbourhood of the scene of the bankruptcy”—it is not easy to comprehend why the two establishments should be kept up ; why these District Courts, with their Commissioners, Registrars, and staff (working, by the way, not quite three days in the week), should be continued at a cost to the suitors in bankruptcy of upwards of £37,000 per annum, more particularly as precisely what is now proposed to be done in regard to matters of arrangement and of bankruptcy has already been done as to matters of insolvency by the tenth and eleventh Victoria, chapter one hundred and two. Indeed that act went further than the present bill, inasmuch as it restricted the jurisdiction of the Court for the Relief of Insolvent Debtors within a narrower limit than it is now proposed to restrict the jurisdiction of the Court of Bankruptcy. It transferred the jurisdiction of the Commissioners of the Court of Bankruptcy in matters of insolvency to the Court for the relief of Insolvent Debtors, and to the judges of the County Courts, restricting the jurisdiction of the Court for the relief of Insolvent Debtors to cases in which the insolvent shall have resided for six calendar months next immediately preceding the time of filing his petition within any parish, the distance whereof, as measured by the nearest highway from the General Post-Office in London to the Parish Church of such parish, shall not exceed the distance of twenty miles, and giving jurisdiction to the County Courts in all cases wherein the insolvent shall have resided elsewhere, and shall have resided for

six calendar months next immediately preceding the time of filing his petition within the district of such County Court to which he shall prefer his petition. The jurisdiction of the Commissioners of the Court of Bankruptcy in matters of insolvency was taken away, and jurisdiction was given in all matters of insolvency to the judges of the County Courts. (See 10 & 11 Vict., c. 102, ss. 4 and 6.)

These observations are equally pertinent now as when they were published, and are entitled to great weight and consideration; and it is also important to bear in mind that, assuming the distinctions between insolvency and bankruptcy are to be abolished, concurrent jurisdiction should either be given to the county courts in all cases, or provision should be made for the county courts to retain jurisdiction to the extent to which they now possess it under the Protection Acts.

In considering what the proposed court should be, Mr. Bond has some sensible remarks in pp. 9 and 10 of his publication:—

It must be local, and it should be stationary. The county courts are already overworked; they sit at different places; there is no appeal from the exercise of their jurisdiction in insolvency; and their machinery is not adapted to administrative purposes. That of the courts of bankruptcy, with some alterations, may be well fitted for the objects in view. Those courts have at present scarcely anything to do. With the present staff, one Commissioner might sit every day at the same place, so as to be at all times accessible (which, however, is unfortunately far from being the case at present); and this is of the utmost importance in very many cases where prompt action is required. With such amendments as may be found requisite, they are, therefore, the most fitting tribunals to undertake that which, according to the plan which has been faintly shadowed out, would become the sole primary jurisdiction in all matters of insolvency, and by giving it to them no expense would be incurred either in new appointments or retiring pensions. It is not necessary to weary you with suggestions as to the amendment of process. Suffice it to say, that it should be as simple as is consistent with perspicuity and the preservation of a proper record of the proceedings of the court, and that it is, for obvious reasons, desirable to secure as much of uniformity as possible.

II. Then as to control, which is the second point to which it has been proposed to direct your attention. When the property of an insolvent debtor has been taken from him by operation of law, to be distributed, as far as it will go, among his creditors, it becomes theirs; and they, by themselves, or by means of trustees or assignees chosen by themselves, ought to have the control of it, instead of, as now, being thought officious and sometimes snubbed, if they presume to make an inquiry about it. Experience has long taught me that the whole official assignee system is an expensive mistake, and the sooner

it is put an end to the better. There can be no doubt that under the old system some wrong was done. But it suited the purpose of the hour to magnify the amount of it; and even then it was insufficient to justify the violent transition which took place from one extreme to the other, under the superintendence of a judge, appointed by the crown, and sitting daily in open court; and not of commissioners, nominated by the parties themselves, and meeting only when convened by them, in a room at an inn, its repetition, if not impossible, would at least be as unfrequent as are the losses by the misconduct of official assignees, or of trustees under assignments, and the total extent of mischief probably less.

The writer here approves of localisation, but is satisfied with the existing courts, which, nevertheless, in our judgment are insufficient; for there are but seven bankruptcy districts throughout England. One great objection to the county courts is, doubtless, their not being stationary, and this is a strong reason for not giving them the exclusive jurisdiction; but we do not see that it is conclusive against their possessing concurrent jurisdiction, which would be a great convenience in the populous manufacturing districts, where the county court circuits are not large, and the judges are sitting almost daily at one of several places within a radius of eight or ten miles. With reference to the machinery or staff of the county courts, we think there would be no great difficulty in adapting it to bankruptcy matters, if the proposed alterations, by which the administrative portion of the business will be intrusted to the creditors, or their assignees, be carried out.

Mr. Rayner thus states the various propositions which have been made with reference to this subject:—

1. That the existing district courts should be continued as at present, debtors owing less than £300 being permitted, or rather required, to file their own petitions for adjudication in the county courts where they reside.

2. That the district court should be retained, the commissioners going circuit to all towns having 20,000 inhabitants.

3. That the district courts should be continued, the county courts having concurrent jurisdiction in cases where the debts do not exceed £1000.

4. That the district courts should continue to have exclusive jurisdiction to adjudicate, a majority in value of the creditors being empowered, at their first meeting, to remove the proceedings into the most convenient county court, provision being also made for debtors to

petition either the bankruptcy or county court for an arrangement under judicial superintendence.

5. That the district courts should be entirely abolished, and the jurisdiction transferred to the county courts sitting in such places, within their circuits, as may be fixed by order in council; the twelve country bankruptcy commissioners, and their registrars, being appointed judges and registrars of county courts, at their present salaries, and attached to the twelve county courts having the largest number of complaints.

The first proposition is contained in the government bill, and the fourth is the plan provided by Lord John Russell's bill. Mr. Rayner then continues:—

After considering these various propositions, we think the best arrangement as to the jurisdiction would be, to restrict the exclusive jurisdiction of the present district courts to the county court circuits in which they are situate, and to give concurrent jurisdiction in all other cases to the county courts in other circuits within such districts. This plan would possess the same advantage which distinguishes Lord John Russell's bill, and would set itself right if the county courts were found inefficient; and it would not increase the business of the county courts in the twelve large towns in which the district courts are held. Its adoption would, in many cases, save the expense of travelling a considerable distance to attend adjudication and first meeting, and, practically, the effect would be, that petitions for adjudication would be presented to the county courts in all cases where, under Lord John Russell's Bill, the proceedings would be removed at the first meeting of creditors; and we do not think that the county court judges are less qualified to adjudicate than to determine questions arising subsequent to adjudication.

The effect of this would be to give the creditor or debtor filing the petition the option of going to the district bankruptcy court or county court in every case, except where the debtor resides or carries on business within those county court circuits in which the district courts are situate; and in the latter case the bankruptcy courts would retain exclusive jurisdiction. We see no objection to this, and we think in many cases considerable expense in obtaining adjudication might be saved by it; but if it be adopted, full power should be given to the district courts to remove the proceedings from the county court to the district court, or *vice versa*, or from one county court to another when it becomes necessary to do so, in order to secure a full investigation, or for the convenience of a considerable majority of creditors.

If this plan be not adopted, there should be added to Lord John Russell's bill clauses somewhat similar to the 49th and 51st sections of the government bill, giving the county courts concurrent jurisdiction to adjudicate where the debts do not exceed £300 or £400. With this addition Lord John Russell's bill will probably be satisfactory to the commercial community in towns which do not possess bankruptcy courts at present. Here the inconvenience of attending the present courts is so strongly felt, that no measure will be acceptable which does not at the least give concurrent jurisdiction to the county courts after adjudication in the mode provided by this bill.

The question as to the propriety of retaining, in all cases, the service of the official assignee after the choice of trade assignee, is, as we have before intimated, materially affected by the provisions to which we have just alluded ; and we do not see how, independent of other considerations, the present system can be conveniently continued if the creditors are allowed to remove the proceedings into the county court which is most convenient to them.

It is by parties who are concerned in cases which will be removed, that the strongest objections to the compulsory employment of official assignees are felt ; and it will be of little use to allow them to transfer the proceedings, if they are compelled to employ an official assignee attached to the district court.

We do not wish, however, to consider the question upon this narrow ground alone.

Mr. Bond instances as one of the greatest evils of the present system—"That so much of the management and control of an insolvent estate is given to officials, and too little to the creditors or their trustees—the trade assignees." And again he says, "that the official assignee system is an expensive mistake, and the sooner it is put an end to the better."

Mr. Rayner takes the same ground at p. 15 of the useful reprint of his able articles in the *Solicitors' Journal*:—

The most important question arises with reference to the future position and duties of the official assignee ; but we need not discuss

this subject at any great length, as both the bills before parliament provide, in effect, that the creditors may, at their option, continue or determine the official assignee's services at the first meeting. The entire abolition of the office has been advocated ; but in this we cannot concur, as it is most important that there should be an officer of the court ready to step into the possession of the bankrupt's estate the moment after adjudication. The official assignees are especially fitted to perform this duty, for which it is proposed to pay them £500 a-year, and such of them as are qualified and willing to act efficiently as trade assignees, will doubtless be elected in most cases by the creditors. It has been objected that the salary proposed is too small ; but we understand that when the first batch of official assignees was appointed, they had no expectation of receiving more than £500 per annum for their whole duties as now performed, and we feel sure that nothing but their own disqualification or inaptitude for business will interfere to prevent their realizing incomes under the new act, equal to those now received by them.

At the first meeting the creditors are fairly entitled to choose a trustee or assignee, for the winding up and distribution of the estate, which is in reality their own, and we do not think it consistent with any sound principle to deprive them of this right. The bankrupt's property and assets can be more economically realized by such an assignee than by an official of the court, and nothing is easier than to make provisions for securing the estate, and its speedy administration. Under the old system these provisions did not exist, but we have never yet heard it contended that the estate was not more effectually and economically realized by trade assignees under the old law, than by an official assignee under the present system. The only inconvenience to be apprehended under Lord John Russell's bill, is, that it may give rise to a good deal of canvassing or touting, by those who are eligible to be appointed creditors' assignees, which we understand is the case in Scotland, but this may probably be avoided by electing the inspectors first (who would usually be the three largest creditors) and allowing them to choose the assignee. Great care must, however, be taken not to disturb the provisions for securing and speedily administering the estate, as it will furnish the strongest argument to the supporters of the present system, if the bill be in the slightest degree defective in this respect.

It appears to us that the most important aspect of the question is this:—Is it, or is it not, a sound principle of legislation, to insist upon the creditors employing an officer of the court, to get in and distribute assets which are in reality their own, and which they consider can be as effectually and economically realized and divided by a trustee or assignee of their own choosing? Experience should decide the point. The authors we have quoted think the principle bad, and that it would be just as reasonable

to enact, that the Court of Chancery should appoint a dozen official receivers, and to insist that in every case parties should employ one of them, though they were satisfied that the duties to be discharged could be more efficiently performed by a person appointed by themselves. There is too great a tendency in modern legislation to appoint functionaries to do every thing for every body. Various objections to the above proposed alteration of the law have been propounded, amongst which we would notice those by Mr. Lawrance, who thus speaks on the subject of official assignees :—

I consider the retention of these officers indispensable. There was no provision of Lord Brougham's Bankrupt Law Amendment Act, 1831, which was so loudly called for by the then existing state of circumstances, or which has worked so well, as that by which official assignees were appointed. It would be in the highest degree dangerous, by displacing those functionaries, to re-enact all the monstrous iniquities of the system which preceded their appointment. The appointment of creditors' assignee was in those days canvassed for with peculiar avidity, involving as it did the absolute control of the funds, and an indefinite postponement of a dividend.

The early returns made by official assignees show the enormous sums which the creditors' assignees retained, sometimes from cupidity, and sometimes from carelessness as to their appropriation, but in every case the creditors suffered severely from the non-distribution of the funds.¹

The following passage, in the report of the commissioners of 1853, is very significant upon the point we are now considering. "But when," say the commissioners, "we bear in mind that large defalcations have occurred, and that the checks imposed have been inadequate to prevent them, we think that other and further regulations may be advantageously adopted, partly by extending the existing rules, partly by giving an additional control over the official assignee's receipts, and partly by ensuring a more vigilant application of the tests prescribed."

The commissioners then advise the adoption of a series of rules for ensuring the safety of the funds in the official assignee's hands, and a more speedy administration of the estate, recom-

¹ Since the above letter was written, the writer has published his reasons in detail, for retaining the official assignees in all cases, (*Vide Solicitors' Journal*, p. 391.)

mending, amongst other things, that it be the duty of the creditors' assignee in all cases to examine the official assignee's accounts with his books and the bankrupt's balance sheet, and certify his examination and approval, or objections, to the Court.

It would almost appear from this, that, in the opinion of the commissioners, the official assignee can only be safely employed under the careful supervision of the creditors' assignee, which we think is any thing but a good reason for rendering the employment of the former compulsory. We must admit that a portion of the commissioners' report bears in favour of the maintenance of the office question; but we must also recollect that the report was founded upon the evidence of witnesses resident in London, and on answers to questions received exclusively (with the exception of the Bradford Chamber of Commerce) from parties in towns, in which the district courts hold sittings, and by whom the inconvenience of the present system is least felt.

Those who advocate the abolition of the office of official assignees, urge that the court need not possess less control over the funds in the hands of a trade assignee than if they were in the possession of an official assignee; and that it is not likely that the individual profit of a paid trade assignee, will induce the creditors to take any course but that which is for their own greatest advantage. We do not, indeed, expect that the official assignee's services will be continued where the proceedings are removed to a county court at a distance, as they cannot conveniently act in such cases; but it will be their own fault if they are not chosen in nearly all other cases, as the interim management of the estate will give them an advantage over all other candidates.

If the present system of official assignees be changed, as proposed, the existing officers should be paid a liberal salary for the duties which they will personally be required to discharge in taking charge of the estate between the adjudication and first meeting, and such expenses as they may incur in obtaining assistance. If they are well qualified to act as creditors' assignees, they may rely upon being employed in the great majority of cases

for which they will be entitled to be paid ; and from these two sources we have no doubt they will obtain an average income equal to the amount of their fees at present.

Mr. Lawrance, in the paper we have alluded to, has ably stated all the objections which can be urged against the proposed alteration of the law, but without inducing us to agree with him, or leading us to the conclusion that the provisions of the two bills do not place the subject upon a proper footing ; viz., that of allowing the creditors to elect an assignee of their own choosing at the first meeting, if they think that course more advantageous to their interests, than continuing the services of the official assignee.

Time has been now given by the dissolution for the consideration of the points raised on the reform of the bankruptcy laws. We trust it will be wisely employed to repel the combination of those interested in maintaining the proved abuses of the present system, and to insist on that course being followed by the legislature which is demanded by the declared wants of the commercial public.

ART. XIII.—LORD MURRAY.

THE legal profession and society at large have sustained an irreparable loss in the decease of this distinguished person. The Scottish Bench has been deprived of a most able, upright, and indefatigable judge ; and the last of the celebrated body of contemporaries is gone which made Edinburgh famous in literature as well as in law. Of these the last whom we had occasion to lament was Lord Moncreiff, one of the greatest judges who ever appeared in any part of the island, and one who, before his elevation to the Bench, held a high rank in the Liberal party—the steady and consistent friend of civil and religious liberty, and the enlightened, because the temperate, supporter of all improvements in our jurisprudence. He had never, like Lord

Jeffrey and Lord Murray, held parliamentary office ; but before he quitted the bar he was the most useful counsellor of the party which devoted itself to the amendment of our law and our judicatures. In one respect his relation to political affairs differed from that of Lord Murray, who adopted, from conscientious convictions, principles adverse to those of his family ; while Lord Moncreiff had an hereditary right to his long and close connection with the Whig party, of which his venerable father was a distinguished ornament.

Lord Murray was the second son of Lord Henderland, nearly related to the Stormont family—a learned and able judge, who had also been one of the Crown lawyers in the Dundas administration, and he was nephew by marriage of Sir Ilay Campbell, the last President of the Court of Session, before its division into two branches. His mother was a niece of the great Lord Mansfield, by whose advice he was sent to Westminster School for some part of his education. He did not, however, like his brother, proceed to Oxford, but returned to Edinburgh, where he finished his studies, and formed those intimacies which continued for life with the most remarkable men of the place, and with others who resorted thither for the inestimable advantage of studying under such teachers as Playfair and Stewart. Of these the chief were the late Lord Kinnaird and the present Lord Lansdowne, one of his oldest and most valued friends. They met, for the last time, during a visit which the latter paid to Scotland in the month of September last.

The son of Lord Henderland and the nephew of President Campbell was secure, not only of professional success, but of the regular promotion which capacity and acquirements far inferior to his could command in those days for any one disposed to range himself under the dominant powers. But he at once showed that he would take a course independent of all party, and in this he steadily persevered. The natural, almost inevitable, effect of one class being banded together by the ties of office, with exclusive principles and party discipline, is to create an opposite combination among their adversaries, with similarly

exclusive views. Now, although Lord Murray belonged through life to the Liberal party—the Whigs, as they were in those days termed—yet he never, whether in office or as a private individual, would submit to the discipline which raises prejudices and even personal feelings into the rank of principles, and is often exceedingly hurtful to the cause intended to be served. Hence arose the profound respect entertained for his opinion, even at times when party violence was at its height, and the deference to his wishes when more factious views were generally prevalent. His great influence, both in political and in literary affairs, arose not only from the confidence in his sound judgment and extensive information, but from the knowledge which all had of his generous nature, his high sense of honour, his undeviating and scrupulous integrity. We have said literary as well as political affairs; and with reference, certainly, to the celebrated *Review* which he joined in forming, he contributed most valuable papers to it, and was consulted by his colleagues respecting its management, with an unvarying confidence in the soundness as well as the honesty of his advice. A remarkable instance of his sagacity and excellent judgment—of his being what the French term *de bon conseil*—was afforded in 1812, when (as Lord Grenville and Mr. Ellis—afterwards Lord Seaford—accompanied their friend Mr. Canning to the Liverpool election) Mr. Murray accompanied Mr. Brougham. He had daily intercourse with these distinguished adversaries, and it was their constant remark that his judgment during the whole progress of the contest never was at fault. In all probability they also assumed that he would have advised the compromise which they had so much at heart, and by which each party would have returned one member.

There was nothing more striking in his character than the entire absence of all selfishness—the uniform putting his personal claims out of the question when they would interfere with those of others, and his preferring of the public interests or those of his party to his own. When the Whig government was formed in 1830 he at once waived his claims to office, and only succeeded to the place of Lord Advocate upon Lord Jeffrey's

removal in 1833. But he had some time before made a sacrifice of his ease by coming into parliament for Leith, one of the burghs enfranchised by the act of the preceding year; and he consented thus to enter parliament, for the first time, the moment it appeared that the interests of the public and the party required it.

The most absurd tales have been circulated of his inefficiency, as a supporter of the *Edinburgh Review*, as well as a member of parliament, and as minister for Scotland. These silly effusions of ignorance or spleen, or both combined, are the less worthy of notice, as regards Lord Murray, that they extend to the whole circle of his celebrated contemporaries; and though it has not been deemed safe to deny Lord Jeffrey's literary eminence, he is put down among the rest as having completely failed in the political world, from the moment that access to power had been opened to the party. That he carried through the great Reform Act for Scotland, and laid the groundwork for reforming her corporations, as well as established the system of burgh police, should suffice to disperse at once such idle fictions. But the course of his successor in the administration of Scotland was marked by the carrying of measures of which it would be difficult to over-estimate the value, nor could one well exaggerate the difficulties thrown in his way by the state of parties in both Houses of Parliament, as well as in Scotland. To specify all of them would be superfluous; but in this place there are some which may appropriately be mentioned, because they affected the amendment of the law in its most important branches. In 1836 he carried an Act to lessen the stringency of entails, by enabling heirs of entail to deal with the property, and creditors to be paid under certain proper restrictions. In 1837 he carried a most useful Act, touching the jurisdiction of the local courts in small debts, and the year after he succeeded in putting these courts upon a more regular and satisfactory footing. It should be added that the universal opinion in the House of Commons was, that from his great fairness, his perfect candour, his full acquaintance with the subject discussed, and his power of distinct, lucid,

and impressive statement, no person in his position had ever given more entire satisfaction, and hardly any one could be named as his equal. That he distinguished himself in all the cases which brought him before the House of Lords in its judicial capacity may easily be supposed from his success at the Scotch bar, when practising in times marked by the greatest lawyers and most eminent advocates of any age. He was found without the parade of learning displayed by those whose whole lives had been devoted to the black letter of the profession, yet perfectly equal to cope with them upon their own ground. He had, indeed, that which is the foundation of all great success—a perfectly clear understanding, an ample practical acquaintance with the subject of debate, and a mind not to be misled by passion, or seduced by the vanity of self-display. It was a peculiar characteristic of his nature that modesty both strengthened and adorned it. We say strengthened as well as adorned, because the intellectual powers are hardly more impaired by moral defects than they are by the inroads of self-sufficiency and self-esteem—as hurtful as they are ridiculous. We have said nothing of Lord Murray's public speaking, because we have been dealing with more important, more substantial matter; but in this country a most extravagant value is assigned to it, and therefore we may record what has been said of him in this respect, we believe, by one of his most accomplished successors, who heard his speech in 1831 upon the rejection of the Reform Bill, and who, after stating that he had heard all the greatest speakers of the day, declares that it "was one of those bursts of oratory which electrify and bewilder, and that he never heard a spontaneous rush of more genuine and absorbing eloquence, and that none who heard it ever will forget it."

The office which he held for years of great difficulty, in regard to personal and party conflicts, as well as in other respects, was calculated to show very remarkably his perfectly honourable, equally with his kindly nature. It was said by Lord Grey, under whom he acted for part of the time, that whatever application came from him might at once be acted upon as a matter of

course; for he alone of all connected with Scotland never urged any claim on which the least doubt could exist. Lord Grey, it must be added, in fairness to others, had not always made allowance for the position of those representing a party which had for so many long years been excluded from all access to the dispensers of patronage.

In private life Lord Murray was singularly amiable, and in all its relations without a fault, unless a fault it be to exercise a generosity so unexampled that it might have been regarded as romantic, but for the perfectly judicious selection of its objects. His connection by marriage with a lady of a distinguished family in the north of England formed the happiness of his life; but the early loss of an only son, whose promise had been very great, shed a gloom over the days of both these excellent persons, and his brother's death, at a much later period, greatly added to their grief.

ART. XIV.—RECENT ATTACKS ON TITLES TO REAL PROPERTY.—CONSERVATIVE LANDED ESTATES BILLS.

1. *Speech of the Solicitor-General, M.P., on the introduction of Bills to simplify the Title to Landed Estates, and to establish a Registry of Titles to Landed Estates.* February 11, 1859. London: Amer, 1859.
2. *Drafts of Bills (No. 1) to simplify the Title to Landed Estates, and (No. 2) to establish a Registry of Landed Estates.* Prepared and brought in by Mr. Solicitor-General, Mr. Secretary Walpole, and Mr. Attorney-General. Ordered, by the House of Commons, to be printed, February 11, 1859.
3. *Drafts of the same Bills as amended in Committee.* Ordered, by the House of Commons, to be printed, March 1, 1859.
4. *A Letter to the Solicitor-General on the Landed Estates Bills.* London: Maxwell, 1859.

5. *The Title to Landed Estates Bills, and the Solicitor-General's Speech considered.* By F. W. HAWKINS, Esq., of Lincoln's Inn, Barrister-at-Law. London: Maxwell, 1859.
6. *Remarks for the Consideration of Landowners, Merchants, Bankers, and Others, issued by the Manchester Law Association; and Report of the Sub-committee appointed by the Committee of the Association.*
7. *Speeches of Robert R. Torrens, Esq., explanatory of his measure for Reform of the Law of Real Property; to which is appended a copy of the Act, as passed by the Parliament of South Australia.* 1858.

SIR HUGH M'CALMONT CAIRNS, the solicitor-general, delivered himself in the House of Commons, on the 11th February 1859, of a speech of great ability, on moving to bring in bills for the simplification of titles to real estate, and the improvement of conveyancing. Many a county member was carried away by his admiration into the belief that there had now arrived, in the form of the new solicitor-general, that long-expected reformer who was to save, henceforth, the land-owner, the land-buyer, and the land-seller, from vexatious harassment and expense. Alas for such abused confidence! Sir Hugh was only demonstrating afresh the truth of a trite remark—that clever things may be said about very foolish measures.

If speech was given to man to conceal his thoughts, speeches are permitted to members of parliament to cover the absence of thought. In the instance we are now referring to, the bills upon which Sir Hugh founded his brilliant address, are miserable examples of audacious incapacity.

It is a legislative crime of the first magnitude to bring forward draft bills, involving such interests as did these Landed Estates Bills, in the form which was stamped upon them when introduced to the House. It is no answer to say they were open to amendment at all hands; it is worse than no answer to say—"Why, we ourselves amended them largely and materially within three weeks after their introduction." If there is one means more

effectual than another for causing confusion, contradictions, omissions, imperfections, and "messes" in our Statute Book, it is by a government officer pitching into the House an ill-conceived, ill-drawn, or partial draft of a bill, trusting to chance for its amendment in its various stages in passing through the House. In the process of tinkering one always risks making more holes than one mends; but when a score of tinkers of different strengths and notions all work at some weak tinman's frail manufacture, the moment it is returned into his possession and he puts his own head into it, even he, however short-sighted and dull he may be, must, upon examination, find it will not hold water.

The original bills either pretended to be, or professed not to be, prepared by competent persons properly instructed as to the principles and objects of the measures, and as to the important parts of the machinery to be employed under their provisions. This is a necessary alternative. If the bills did not profess to be more than *sketches* of the measures thought desirable, and were mere suggestions to be remodelled and modified, should they be accepted at all; or if they were intended to be discussed and then put by for the session; or if they were brought forward just as a little attempt of new hands *pour passer le temps*, or because it was felt something must be done to show diligence and redeem promises,¹ then all we need remark is, that trifling with such a subject in such a way is an intolerable impertinence.

As such conduct, if proved, would incapacitate the men guilty of it from being henceforth trusted with any legislative measure of importance, we will assume the other alternative to be the true one; namely, that the bills professed to be prepared by competent persons—to be the result of mature consideration—to carry out a necessary reform in a complete, safe, intelligible, and practical manner—to meet all the well-ascertained wants in approved modes, and with machinery suited to the material to

¹ It has been avowed that the Government Bankruptcy Bill of the session 1858 was brought forward because the public expected something, but with the intention of *not* passing it.

be wrought upon, the classes interested, and the days we are living in. Assuming all this, we will examine the original bills, which we are thus in courtesy forced to believe were in all material points those which the Solicitor-General meant to place, in their integrity, on the Statute book, and which he did not intend to submit to a process of wretched patching, tinkering, and cobbling, either at the hands of himself or of others. In so doing, however, it will be convenient, and in the result as astonishing as convenient, to compare these original bills with the bills as amended in committee by the learned, popular, but rash Solicitor-General himself.

The original Bill No. 1 contained *seventy-seven* sections. Of these, *three* were altogether omitted, *fifteen* were materially, and *twenty-six* verbally, amended by the Solicitor-General within three weeks of his imposing oration. But this was not all that was done to improve the bills; for, at the same time, the opportunity was taken of adding *eleven* entirely new sections. The thirty-three out of the seventy-seven clauses which escaped being tinkered by the master-hand are chiefly of the most ordinary kind, comprising provisions for appointments, salaries, stamps, &c., and probably will be found to contain only the mistakes ordinarily found in such sections.

The original Bill No. 2 contained *seventy-nine* clauses and a schedule of forms. The Solicitor-General's second thoughts induced him to omit *six* of these clauses, to alter *twenty-three* materially, and *twenty-eight* verbally, and to vary only two out of the five forms in the schedule. Thus were just *twenty-two* sections, and *three* forms left as primarily settled! The character of those latter sections is the same as that of the untouched clauses of Bill No. 1. In Bill No. 2, as amended, we find *eighteen* new clauses.

Recent political occurrences have rendered the withdrawal of these bills necessary; but we may expect that their introduction into the next parliament, either in their present shape or with further amendments, will be attempted. An examination of their details at the present time is, therefore, not out of place; and,

moreover, it is from such an examination that the incapacity of the promoters of the measure ever to deal with any reform of real property law can be clearly proved. But before we enter upon the consideration of the bills in their original inspiration, their amended wisdom, and felicitous additions, contradictions, entire omissions, partial retractations, and experimentalizing provisions, it is necessary to put before the reader a brief outline of the whole of the proposed scheme, and this outline Sir Hugh M'Calmont Cairns has furnished us in his speech. The scheme embodied in Bill No. 1, he thus describes :—

We propose that any owner in fee simple of land, or any one who has power to dispose of the fee simple of land for his own benefit, and who has been in possession or in receipt of rent by himself or predecessors for a period of five years, may come to the court which we propose to establish, and which I will presently describe, and apply to have a declaration affirming his title to that particular land. He will have, in the first instance, to supply to the court an abstract of his title, and a description of the land he claims. It will be the duty of the court to see that two things are done—first, that there is shown in the document submitted to them a *prima facie* title, and next that the petitioner shall declare his willingness and give a sufficient pledge to meet such costs as may be necessarily incurred in the further investigation of the title by the court. When that is done, the court will proceed, by advertisements in the newspapers, and by notices served on and in the vicinity of the land in question, to make public the application which has been made to them. It will be incumbent on the applicant to the court, if he does not claim a clear fee simple, to state that he claims a title subject to certain encumbrances, and the court may announce that the application to them is for a title subject to certain encumbrances. * * * * If, however, any encumbrance is withheld from the knowledge of the court, the publication of the notice will enable the encumbrancer to appear, and we provide that the costs of such appearance, when the claim is proved, shall be paid by the applicant. The same course may be taken where two or more persons constitute the owners of an estate. We have fixed upon two periods in respect to which the court shall be governed in granting declarations of title, at the end of the first of which the court may make a provisional declaration of title, and at the end of the second an absolute declaration. Those periods, although open to further consideration, are these—twelve months for the first, and three months for the second. We have selected those periods because we find from a statement of Mr. Hargrave, that the average period in which a sale is completed, and the money distributed by the Encumbered Estates Court, is 15 months. During that time publicity continues, and there exist opportunities for persons to come forward and make claims if

they have any ; and, considering we are dealing at once and for ever with a title, I do not think we ought to fix upon a shorter period. There are certain things which every title must be subject to, and which we do not propose to interfere with—tithe rent-charges and burdens of any description, and easements which can only be discovered by an inspection of the property, such as rights of water and other matters of that description. So also with respect to leases :—We take 21 years as the ordinary *maximum* duration of an agricultural lease ; and in those cases in which there is a lease which does not exceed that period, and the tenant is in possession, we do not propose to interfere in any way with that lease or holding, and the title will as heretofore continue subject to every instrument of that description. These are all matters which can be ascertained by any person who may be desirous of doing so on the spot, and not matters as to which there will be any necessity of giving notice of title. Well, when the declaration of title is made, we propose that its effect should be as follows :—That it should be efficacious in substance, for the purpose of change of ownership—that is to say, that it should be a declaration which will enable a valid title to be conferred on sale, or mortgage, or lease, or settlement of landed property ; in short, on any kind of dealing described in law as taking place for valuable consideration. We do not propose that the declaration of title shall be indefeasible, so long as the land is really held by the person who obtained it, or from him by a voluntary transfer without value. We propose that, to serve the purpose of alienation for valuable consideration, it shall operate, and that it shall not come into action unless there is some purpose of that kind to serve. We further propose, that office copies should be furnished by the court under which the provisions of the bill, if it should be passed into a law, will be administered, which documents will constitute the certificate of title of the owner of the land. We also propose that the same process should be pursued upon the occasion of a sale, if the vendor or purchaser should deem it desirable to receive from the court a declaration of title of this kind : in that case the vendor and purchaser will jointly apply, and there will be a conveyance by the court to the purchaser. We, in addition, provide that in the case of any claim upon an estate which from its nature is reducible to a simple money claim, and which does not go to the possession of the land itself, the court shall have the power to require that a sum should be deposited with it previous to the declaration of title, or sale for the purpose of meeting the charge, should the necessity for its payment subsequently arise. We propose, moreover, that this power of conferring a title on sale should apply to sales under the Settled Estates Act, and also to estates under the control of the Court of Chancery, the new court in such cases having a discretion to decide whether or not an indefeasible title ought to be given. We also provide * * * that if any person should consider that he has an interest in an estate—be that interest ever so unascertained or remote—which he may think would be likely to be overlooked in a declaration of title of this kind, he should be empowered to lodge with the court a caution or *caveat*, setting forth the land to which his claim applies ;

the result of which proceeding would be, that when application was made for declaration of title with reference to the land which was stated to be involved in the claim, the person lodging the *caveat* would be entitled to notice of such application. * * * *

"We propose that a Landed Estates Court should be constituted, with a chief and secondary judge. The qualification as to each of those judges, we propose should be this:—that he should be either a conveyancer in practice, and who has practised for ten years; or a person who has for a certain number of years filled the position of a judge in the Landed Estates Court in Ireland. * * * With regard to the salaries of the new judges, what we purpose to do is not to place them on a par with the judges who preside in the superior courts, but rather to regulate the amount of remuneration which they should receive with reference to the question of what might be considered a sufficient inducement for a conveyancer in good practice, and in all respects efficient, to accept one of those appointments. Looking upon the matter, then, from that point of view, we propose that the salary of the chief judge should be £3000, and that of the second £2500 per annum. We further propose that each of them should be provided with a secretary and a chief clerk chosen by himself, and that the new court should, with the concurrence of the Lord Chancellor, have the power to frame rules for the due regulation of the entire of its practice. We also propose that, as questions of law or fact may arise in the court, and involve a species of litigation which would be foreign to its constitution, it should be enabled to submit such questions to the decision of some other tribunal. With respect to the financial arrangements connected with the court, we hold that, if our scheme should turn out to be successful, it will be as the Landed Estates Court in Ireland will be, to a considerable extent, if not altogether, self-supporting. It is, we conceive, considering the benefit to be conferred on the parties resorting to the court, no unreasonable requirement to ask those who come before this court to seek the boon of a simple and indefeasible title to their estates, to pay a moderate sum in the shape of a per-centage for the work which they call upon it to accomplish in their behalf. If that be done then will the court be to a certain extent, if not altogether, self-supporting; although of course it cannot be fairly expected that that will be the case during the first year of its existence."

The scheme relative to a registry of titles is embodied in Bill No. 2, and is described by the Solicitor-general as follows:—

"We propose, having once got an estate into such a position that it may receive a declaration of indefeasible title, to give to the person who has that declaration of title a power to put his name upon the register, and, once on the register, it must continue there. Whether the name is or is not, in the first instance, to be put on the register, is at the option of the owner. * * * * It will now, perhaps, be desirable that I should describe how we propose to meet the case of dealing with the land which we have thus got fixed on the

register, and I think it will be best to show, in the first place, what we do with regard to dealings which fall short of a transfer of the estate from one man to another. As to leases, I do not propose that the bill should affect 21 years' leases when tenants are in possession. They will go on as at present, and will not be affected by registration. With regard to longer leases, we propose that the holder of such a lease should have a right to put on the register, when his title is once proved, a leaseholder's notice; not a registry of his lease, nor a description of it, but simply a notice of his name and address. Where this leaseholder's notice is entered, then, before any dealings with any estate can take place, the person so dealing will have notice, and the persons proposing to purchase will have notice that he is a leaseholder. With regard to mortgages which do not involve the transfer of the estate, what we propose is this:—Many people who borrow or lend money do not care a straw whether or not the fact is published at Charing-cross, while, on the other hand, many are unwilling that there should be any publicity. We shall endeavour to meet both of those cases. We propose that there shall be a power of registering mortgages, just in the same way as there are now registered mortgages of ships. These registered mortgages will thus be the title to the mortgage charge; they will pass, by transfer upon the register, from one man to another, and be in themselves a sort of estate in the charge; and they will always appear on the register as a check upon any dealings with the property. That will meet the case of mortgages as to which there is no desire for secrecy. But we propose that mortgages may go on unregistered, as at present, and that any person who has a mortgage may simply protect himself by a mortgagor's *caveat*, which will reveal nothing, but will entitle him to notice before any dealings to his detriment can take place with the land, while it will also serve as a notice to any person who is about to deal with the land that this mortgagee has an interest in it. * * * * I pass now * * * * to sales and settlements. Under this bill any intending purchaser of an estate will have only to say to the vendor, 'I will give you so much money for your estate as soon as you show me that your name is on the register, and that there are no *caveats*. If there are *caveats* you must settle with them, and when you have settled with them, transfer the estate to me, and here is your money.' As to settlements, when it is wished to settle an estate the course will simply be to transfer it to the names of the trustees of the settlement; and we propose to adopt a most valuable suggestion made in the report of the commissioners,¹ namely, that those trustees * * * * should be tenants in common, * * * * that the moment one dies there should be an incapacity to deal with the land until another is appointed in his place. That provision will keep up the number of trustees, and will, I hope, satisfactorily meet the case of a settlement. I have been speaking hitherto of transfers for valuable consideration. Here, as in the case of declaration of title, we propose that where the transfer is merely voluntary, and not for any valuable

¹ The solicitor-general here refers to the report of 1856, upon the registration of titles.

consideration, it should be dealt with according to the present law of voluntary dispositions, and that if there has been any fraud or impropriety the transfer should not confer a title on the transferee. The only other point in the scheme is that of *caveats*. We propose that *caveats* should be of two kinds—*caveats* proper and *caveats* of inhibition. Any person who thinks he has a right to be apprised of any dealings in respect to an estate upon the register may enter a *caveat*, the effect of which will be that no dealings can take place until the lapse of a certain number of days after notice to the cautioner, just as is the case in matters connected with stock. If the owner undertakes to satisfy the Landed Estates Court, by proper security to the extent of the whole value of the estate, that the *caveat* has been wantonly and improperly entered, he may then, without waiting the specified number of days, have it removed.² So, also, the court may order the *caveat* to be taken off after hearing the parties, and, if it has been wantonly entered, the person entering it will be answerable for any damage caused by the delay. *Caveats* proper, therefore, will be put on the register simply by individuals. Inhibitions will be of a more permanent and formal character. When there is a settlement for a great number of years, the inhibition will operate as a restraint upon sale, and will be put upon the register by the court itself, if it thinks fit to do so, until the expiration of a particular time, as, for example, until the children under a marriage settlement come of age. These inhibitions will be placed on the register by the court, and it will not be in the power of any individual to enter them. * * * * * The question then arises—Where do you mean to have this registry? We propose that it should be a metropolitan registry simply * * * We propose also that it should be self-supporting, by means of moderate fees taken in return for the services which it will perform, such fees to be a matter of future regulation; and in this way we hope that very little charge will ultimately be imposed by the establishment of this office. I should add that, inasmuch as the register is to be confined to estates in respect of which there has been a declaration of title by the Landed Estate Court, and inasmuch as I have assigned a period of fifteen months to elapse before there can be any declaration of title, it will not be necessary that the work of the registry-office should commence at once. I propose, therefore, that the operation of this act should be fixed by orders in council, according as it is found that the Landed Estates Court has made progress.”

We now proceed to the examination of some of the details of the bills which Sir Hugh, in concluding his speech, ventured to hope would be found not ill-considered.

The three sections in the original Bill No. 1, which were discarded, are secs. 18, 26, & 28. Sec. 18 provided, that whenever a contract for sale was entered into, the parties to that contract, or either of them, might apply to the Landed Estates Court for a

² There was no clause to this effect in the bill.

conveyance to the purchaser, with the restriction that the application should not be made by the vendor alone without the consent of the purchaser, or by the purchaser alone without the consent of the vendor, unless, in the latter case, the purchaser should give security for payment to the vendor of all such additional expenses as he might thereby sustain, beyond the expenses he would have sustained if no application had been made by the purchaser. Now, in the first place, it is unreasonable that a vendor should, at the option of a purchaser, be forced into a Landed Estates Court litigation; secondly, while the purchaser might be prosecuting his suit in the Landed Estates Court, the vendor might prosecute *his* for specific performance in the Court of Chancery, and thus a conflict between the two courts might have arisen; and thirdly, the judges of the Landed Estates Court must have had recourse to a *clairvoyant* to determine what the vendor's costs might have been had something been done which was not, and was not intended to be done.

Section 26 directed that the court should not execute a conveyance to a purchaser without the consent of the vendor, unless proof should be given of the payment of the purchase-money. This clause was objectionable, inasmuch as the Court, in the first instance, executes the conveyance provisionally, and the purchaser certainly could not be required to pay the purchase-money to the vendor upon the execution of a conveyance which might be annulled. The amended bill is silent as to the payment of purchase-money; but under the power to make rules for giving effect to the objects of the measure, the court could, we presume, make rules on this somewhat important point.

Section 28 gave the Landed Estates Court all the power of selling land vested in the Court of Chancery, by the Leases and Sales of Settled Estates Acts; thus not only creating a new jurisdiction, concurrent with that of the Court of Chancery—the consequences of which might have been, that an application for a sale, refused by a Vice-Chancellor, might have been entertained and granted by the new court—but also giving the new court powers of effecting sales of settled lands of *all* tenures, and of every kind of interest in settled lands, whilst the rest of the bill applied only to estates in fee simple. This section must have been remarkably well-considered!

The eleven new sections in the amended bill No. 1, are secs. 2, 19, 27, 31, 33, 41, 42, 47, 49, 67, and 68.

Section 2 provides that the act shall apply to England only; a necessary provision, seeing that there was nothing in the original bill to limit the operation of the measure to that part of the united kingdom.

A trustee with power to sell, was empowered to apply, with a

view to a sale, to the court for a declaration establishing his title to sell; but the five years' possession clause, which is referred to in the Solicitor-general's speech, would have effectually prevented trustees not in possession or receipt of the rents of the trust estate, from taking advantage of the act. Sec. 19 of the amended bill, therefore, provides that possession or receipt of rent by any person, consistently with the instrument creating the trust, shall be deemed to be the possession or receipt of rent by the trustee.

Section 27 empowers the court to make rules as to the mode of executing and confirming a conveyance by the court, and of making modifications therein, or additions thereto.

It being considered doubtful whether, under the original bill, the court could make more than one declaration or one conveyance in respect of any one application, sec. 31 put an end to the doubt, by providing that the court may, to suit the convenience of the applicant, make several declarations in respect of, or several conveyances of, different portions of land in respect of which the application is made.

Where land is subject to any doubtful claims capable of being compensated by money, the Landed Estates Court is empowered to free the land from such claims upon payment of such a sum of money as the court may deem sufficient. By the original bill the money was directed to be paid into the Bank of England (where it would have lain idle), to an account to be named by the court. Sec. 33 provides that compensation money may be paid to trustees approved of by the court, or into the Bank with the privy of the Accountant-general of the Court of Chancery, to the credit of such matter as the Landed Estates Court may direct, with power for that court to order the money to be invested on application for that purpose by any person interested in it. Now here we have a notable example of the dangers of tinkering. Sec. 34 of the amended bill is a repetition of sec. 31 of the original bill, with some verbal alterations; but these have not been made with regard to the new sec. 33; and thus we find that the Landed Estates Court is directed to determine the rights of persons interested in the compensation money "so paid into the Bank of England under this act," and to distribute the same accordingly; but what is to become of the compensation money if paid to trustees under sec. 33, the bill does not say.

Sections 41 and 42 relate to the notices to be given to persons by whom *caveats* may be lodged. A notice may be sent by post, or may be served upon the cautioner personally; and, if sent by post, the letter is to be registered and marked outside, "Landed Estates Court."—(Amended Bill, sec. 40.) The original bill provided that the notice, if served by post, should be deemed to have been served at the time when the letter containing the

same would be delivered in the ordinary course of the post (sec. 37); but the amended bill provides that no proceeding shall be taken on the faith of the notice having been served, until after the expiration of such period, not less than five days, as the Landed Estates Court by general order may appoint (sec. 40); and the new sec. 41 directs the Postmaster-general to return to the "Registrar"—we think that the words "of the court" might have been added—all letters so marked as mentioned above, and addressed to any person who cannot be found.

Section 42 provides that no purchaser, for valuable consideration, shall be affected by the omission to send, or by the non-receipt of any notice. There is a similar section in the amended bill No. 2, and on this last we shall have to make some remarks by-and-by, which will be applicable to both sections.

The original bill imposed a penalty on persons suppressing documents or evidence in the course of proceedings before the court. Sec. 47 of the amended bill imposes also a penalty on persons fraudulently altering any documents in the course of such proceeding, or giving false information to the court, knowing the same to be false.

Section 49 provides that nothing in the act shall entitle any person to refuse to make a complete discovery by answer to a bill in equity, or to answer any question in any civil proceeding in the courts of law, equity, bankruptcy, or insolvency; but no such answer is to be admissible in evidence against such person in any criminal proceeding under the act. How it happened that the law-officers of the crown should have put their names on the back of the original bill without seeing to the insertion of such a clause, must be a matter of astonishment to all.

The original bill directed that the court should hold its sittings at a place to be provided by the Treasury, and empowered the judges to sit in chambers either together or separately, and gave the judges so sitting the same powers as if sitting in open court; but whether the judges were to sit together or separately, or for what purposes they were to sit in open court, the bill did not mention. Sec. 67 remedies this defect, by providing that the judges shall sit together in open court for the determination of such questions arising upon the examination of titles as may be reserved by them—the words "or either of them" are omitted—for discussion in open court.

By the original bill any person might have appeared before the court as agent for another; sec. 68 declares that no person shall be entitled to appear for another in any proceeding in the court, unless he is a barrister, solicitor, or certificated conveyancer.

We now turn to the original bill No. 2, the omitted sections of which are secs. 17, 44, 48, 49, 53, & 55.

Section 17 provided, that where any land was charged, in pursuance of the act, with the payment of any money or interest, there should be implied (unless such implication be expressly negatived), a covenant, on the part of the registered proprietor, to pay the money and interest so charged. We do not know why this clause has been omitted. It would have been useful, inasmuch as money might have been lent on the security of a registered charge alone; whereas, under the amended bill, such a proceeding, if not impossible, would be impolitic, for the borrower would be but a simple contract debtor; which, supposing the security of the land charged to prove insufficient, would not be satisfactory. Could trustees, for instance, lend their money on such a security?

Section 44 provided that if any person should suppress or misrepresent any document, or fact, relating to the title to any registered land or mortgage, he should be guilty of a misdemeanour. When it is remembered that the title to registered land, or a registered charge, can be affected *only* by what appears on the register, and that one great duty of the registrar is to suppress all notices of trusts, and that no purchaser is to be affected by any notice, of any kind, not on the register, it is difficult to conceive what possible object the draftsman could have had in view when he penned this clause, and still more difficult to account for the fact of the Solicitor-general permitting it to remain after he had well considered the whole of the bill in which it was contained.

Section 48 provided that the registrar should keep a list of the persons by whom notices of leases had been given, and that the person whose name was entered in the list, should be deemed to be the "holder of the notice" in respect of which he was registered, and that no notice should be removed without the consent of the holder, for the time being, of the notice. An extremely clever provision is this, by means of which, in the event of forfeiture of the lease, and eviction of the lessee, or upon the expiration of the lease, it would have been impossible to remove the notice without the consent of the holder. The framers of the bills seem at first to have thought that this consent would in no case be withheld!

Section 49 provided for the transmission of notices, upon the death, bankruptcy or insolvency of the holder, or upon the marriage of a female holder, but made no provision for transmission on assignment of the lease by the holder himself.

Section 55 provided that on the death of a cautioner his personal representatives, in the event of bankruptcy or insolvency his assignees, and in the event of a marriage of a female cautioner her husband, should be entitled to notice in the place

of the cautioner so dying, becoming bankrupt or insolvent, or marrying. Here, again, no provision was made for the case of a sale, and conveyance or assignment of the interest in respect of which the caution may have been lodged; and moreover to enact that the representatives, or assignees, or husband of a cautioner, shall be entitled to notice without requiring them first to give notice of the death, bankruptcy, &c., of the cautioner, and to furnish their own names and addresses, is simply absurd. It will also be observed that no provision was made for the case of an interest in land, descendible to the *heir* of a cautioner, or of any interest devised or bequeathed by him.

In lieu of secs. 48, 49, & 55, the amended bill contains a new section (sec. 77), empowering the Landed Estates Court, with the sanction of the lord chancellor, to make rules for the transfer, transmission, and withdrawal of notices of leases and of caution, and for the regulation of any matters relating to registry not provided for by the act.

Section 53 directed how notices were to be served on a cautioner. The amended bill, however, contains a nest of clauses relating to notices, of which we shall presently say a few words.

The new clauses of the amended bill No. 2, are secs. 12, 21, 44, 61, 62, 63, 64, 65, 66, 67, 68, 77, 78, 79, 87, 88, 90, and 91.

The registration commissioners in their report of 1856, in considering the objections to a system of registration of *assurances*, remark (p. 13), that one objection "to a registration of assurances would be the enhanced difficulty of obtaining loans by a deposit of deeds. The transactions of this kind are very numerous. At present a respectable man in possession of title-deeds may, and does, obtain relief in sudden emergencies confidentially, easily, and at a few hours' notice . . . we may confidently conclude, that any system of registration which did not provide for arrangements equal in convenience to the deposit of deeds, would fail to meet with general acceptance." Notwithstanding these remarks, no provision equal in convenience to that of a deposit of deeds was made in the original bill. Section 12 of the amended bill provides that the deposit of the land certificate, shall for the purpose of creating a lien on the land, be deemed equivalent to a deposit of title-deeds.

The original bill did not empower a registered proprietor to charge his land with the payment of an annual sum, but merely with a gross sum and interest (see sec. 15); sec. 16 of the amended bill remedies this defect, and sec. 21 gives the proprietor of a charge of an annual sum, not having a power of sale over the land charged, all such remedies for the recovery of such annual sum as he might have enforced if the same had been a rent-

charge duly charged upon the land by an unregistered instrument. How is a person to determine what remedies he might have had if an instrument existed which does not exist?

Section 44 supplies a grave defect in the original bill; it requires the registrar, on the request of a proprietor, to certify the state of the title of the proprietor—in fact, to furnish him with an authorized abstract of his title, and of all charges, cautions, &c., affecting his land.

Vast powers are given to the Landed Estates Court by this bill. Section 61 provides that barristers, solicitors, and certificated conveyancers, may practise in matters arising out of the act, in the same manner as they are empowered to practise in that court by the act No. 1.

Section 62 provides, that in a suit for specific performance, the court having cognizance of such suit, may cause all persons having registered interests in the land in question, or having entered up notices of leases, cautions, &c., to appear in such suit, and shew cause why the contract should not be specially performed; and sec. 63 provides for the payment of the costs of all such persons.

Sections 64—68 relate to notices, and comprise additions to, and alterations of, various sections spread over various parts of the original bill. By sec. 64 every person whose name is entered on the register as proprietor of land or of a charge, or as cautioner, or as entitled to receive any notice, or in any other character, is required to give an address in England. The original bill required an address in the metropolis to be given in all cases. By sec. 65 every notice required to be given to any person may be served personally, or may be sent by post in a registered letter, marked outside, “Landed Registry”—why not *Land Registry*?—and such notice—“if served by post,” ought to have followed, as in bill No. 1, sec. 40—unless returned, shall be deemed to have been served “on the *cautioner*” at the time when it would be delivered to him in the ordinary course of the post; but no proceeding is to be taken on the faith of such notice having been served until the expiration of such period, not less than five days, as the Landed Estates Court may by general order appoint. It must be here observed that the registered proprietor of land, or of a charge, is in certain cases entitled to notice; but, as he is not a *cautioner*, the portion of sec. 65 which limits the time within which notice is to be deemed to have been served, does not apply to him. This is an example of the evil of patching; the piece of section 65 which we allude to is taken out of bill No. 1, sec. 40; there the term “*cautioner*” is extensive enough, because under that bill cautioners are the only persons to whom such notices by post are required to be sent; but this little bit does not match the clauses in bill No. 2.

Sec. 66 relates to the return of letters to the Registrar, and is similar to sec. 41 of bill No. 1. Sec. 67 is in these words—"On the return of any letter containing any notice, the Registrar *shall act* in the matter requiring such notice to be given, except under the direction of the Landed Estates Court, &c." The word "not" has been omitted between the words "shall" and "act." The draftsman may console himself with the reflection that a similar mistake has before occurred, not only in bills, but in an act of parliament (See 9 Geo. IV., c. 55, s. 46; 5 & 6 Will. IV., c. 34). Sec. 68 relates to the protection of purchasers, and is similar to sec. 42, in bill No. 1.

Sections 77, 78, and 79, relate to the rules to be made by the Landed Estates Court. Sec. 77 we have already had occasion to refer to. Sec. 78 provides that the rules shall have the force of an act of parliament, and may be altered, &c.; and sec. 79 directs that the rules shall be laid before parliament.

The original bill declared the forging of the registrar's seal, and other offences of a similar nature, to be forgery, but did not define the punishment on conviction. To this clause are added four sections, viz., secs. 87, 88, 90, and 91. Sec. 87 declares that if any person fraudulently procures an order of the Landed Estates Court, in relation to registered land, or any entry, erasure, or alteration on the register, such person shall be guilty of a misdemeanour, and it provides that the parties to the fraud shall not be benefited by it. Sec. 88 provides, that no proceeding or conviction for any act declared to be a misdemeanour, shall affect the civil remedy which any person aggrieved may be entitled to against the person who committed the act. Sec. 90 defines the punishment for felony; and sec. 91 relates to the obligation to make discovery notwithstanding the enactment of penalty, and is similar to sec. 49 in bill No. 1, already referred to.

We cannot refer particularly to all the alterations, material and verbal, that have been made by the Solicitor-general in his original bills; for the only mode of distinctly pointing these out would be by printing the original and altered sections side by side. We must content ourselves with noting the sections of the original bills that have been altered, and the corresponding sections in the amended bills, and with mentioning some few of the more prominent alterations and of the grosser blunders, in addition to those we have already incidentally noticed, leaving the reader, if so inclined, to compare the remainder of the clauses the one with the other.

As to Bill No. 1.

The sections of the original bill, materially altered, are:—

Sects. 8, 9, 13, 14, 16, 17, 20, 23, 25, 29, 34, 36, 37, 41, 48.

The corresponding sections of the amended bill are:—

Sects. 9, 10, 14, 15, 18, 20, 22, 25, 28, 30, 37, 39, 40, 46, 55.

Sections verbally altered are :—

Sects. 3—7, 10, 11, 12, 21, 22, 30, 31, 32, 38, 39, 40, 43, 50, 56, 57, 62, 64, 70, 72, 73, 75.

The corresponding sections of the amended bill are :—

Sects. 4—8, 11, 12, 13, 23, 24, 32, 34, 35, 43, 44, 45, 50, 57, 63, 64, 72, 74, 80, 82, 83, 85.

As to Bill No. 2.

The sections materially altered are :—

Sects. 6, 12—16, 19, 20, 23, 24, 26, 28, 29, 30, 38, 41, 42, 47, 52, 54, 62, 70, 76.

The corresponding sections of the amended bill are :—

Sects. 6, 13—17, 19, 20, 24, 25, 27, 29, 30, 31, 39, 42, 43, 48, 51, 52, 59, 75, 84.

The sections verbally altered are :—

Sects. 2, 4, 7, 8, 18, 21, 22, 31—37, 39, 40, 45, 46, 50, 51, 57, 58, 59, 61, 72, 73, 74, 78.

The corresponding sections of the amended bill are :—

Sects. 2, 4, 7, 8, 18, 22, 23, 32—38, 40, 41, 46, 47, 49, 50, 54, 55, 56, 58, 80, 81, 82, 86.

We will now examine some of these amendments. Sect. 15 of the amended bill, No. 1, is as follows :—

“Whenever a final declaration has been made establishing the title of any person to land, every purchaser for valuable consideration of the land mentioned in the declaration, or of any part thereof, or of any interest in such land”—the words “or in any part thereof” are wanting—“shall be deemed to hold the same for an estate in fee simple, or for such less estate as may be conveyed to him, with the reservation, and subject to the incumbrances (if any), appearing in the declaration, or created since the date of that declaration, and subject also, except in so far as the contrary is expressed in the declaration, to such charges and interest (if any) as are hereinbefore declared not to be incumbrances, but free from all other estates, incumbrances, and interests whatsoever”—here the 14th section of the *original* bill stopped, the *amended* section proceeds—“including all estates, interests, and claims of her Majesty, her heirs and successors.”

The maxim, *Roy n'est lié par aucun statute si il ne soit expressement nosme*, must have been forgotten by the framers of the original bill, or perhaps they thought it advisable to leave it open whether the Crown would be bound by the general nature of the words of the section or not. The same blunder occurred in several other sections of the original bills, and is, in all cases, now rectified—(see original bill, No. 1) sec. 25 declaring the effect of conveyance by court; original bill, No. 2, sec. 13, defining the nature of the estate of the first registered proprietor;

and same bill, sects. 28 and 29, defining the nature of the estate of a purchaser for valuable consideration, and of a voluntary transferee respectively, and the corresponding sections of the *amended* bills.

Section 8 of the original bill No. 1, contained an enumeration of the several charges and interests which were not to be deemed incumbrances under the act. Amongst them we find tithe, rent-charges, quit rents, easements of various kinds, &c., but *land tax* was not noticed. In sec. 12 of the original bill No. 2, which defined the various charges to which all registered land was to be deemed subject, unless specially excepted, *land tax* and *quit rents* were not mentioned. These defects have been cured in the *amended* bills; but whether land, in respect of which an indefeasible tithe has been procured, would be subject to parliamentary or parochial taxes (other than land tax), and rates of a general character, seems to be questionable.

Section 34, original bill No. 1, provided that, when the court had made a declaration or conveyance, all deeds relating to the land should be retained by the court. This section proves one thing beyond a doubt; namely, that the framers of this bill were totally ignorant of the *ordinary detail* of the practice of conveyancing. The authors of it could never have perused a single abstract of title, or a set of conditions of sale, or a covenant for production of title-deeds, otherwise they must have known that title-deeds do not always relate solely to the property of one individual; and that some of the title-deeds relating to one property frequently relate to other properties, otherwise held under perfectly distinct titles.

Section 37 of the *amended* bill, No. 1, is indeed rather a new clause than an amendment of sec. 34. It properly provides that all such deeds delivered to the court as relate exclusively to the land, and are of no avail except for the purpose of substantiating the title to the land, shall be retained by the court, and all other deeds shall be returned, marked in such manner as to give notice to any person inspecting them, of the proceedings of the court in relation to the land comprised in such returned deeds.

Many of the powers which, under the original bill No. 2, were vested in the registrar, are by the *amended* bill taken from him, and vested in the Landed Estates Court. For instance, where, upon the first registration of land, notice of an incumbrance has been entered on the register, the registrar, on proof being given to him of the discharge of the incumbrance, was directed to enter on the register a memorandum of the discharge (sec. 14). By the *amended* bill, sec. 15, the Landed Estates Court is to direct the registrar to enter such memorandum. Again, the registrar, on the requisition of the proprietor of a charge, or on the production

of sufficient evidence that a charge had determined, was directed to "enter the discharge"—not a *memorandum* of the discharge—on the register.—(Original bill No. 2, sec. 23.) By sec. 34 of the *amended* bill, the registrar is directed, on the requisition of the proprietor of a charge, or on the production of an order of the Landed Estates Court, to enter a memorandum of the discharge on the register; and a necessary addition to the section is made by stating that, upon such entry being made, the land shall be deemed to be discharged.

Instruments such as transfers and charges, which, under the original bill No. 2, were required to be attested by "one or more witnesses," by the *amended* bill are required to be attested by a solicitor—(See original bill No. 2, sec. 16, 24, and 30, and corresponding sections in amended bill.) This amendment is certainly a good one, for it lessens the danger of fraud.

For the word "mortgage," which occurred over and over again in the original bill No. 2, the word "charge" is substituted in the *amended* bill.

Section 19, in the original bill No. 2, provided that any mortgagee might, in default of payment of the mortgage money or interest, "enforce all such remedies against the mortgagor for the recovery of the money due to him, or for the foreclosure of the land, or otherwise howsoever as he might have enforced, if such land were not registered, or as near thereto as circumstances admit;" but what remedies the mortgagor might have enforced if the land had not been registered, could not possibly have been determined by any one, not even by two conveyancers of ten years' standing. The corresponding clause in the *amended* bill in strictness ought to have been included in our list of new clauses; it is to the effect that the proprietor of a charge may enforce a foreclosure of the land in the same manner in which he might enforce the same if the charge were secured by a conveyance of the land to him, subject to redemption; this clause is better than the one which it supersedes, yet it affords another example of awkward reference so common in this bill, to something that *might have been*, but is *not*, done.

Section 38 of the original bill No. 2, is as follows:—"The husband of any female proprietor of land shall be entitled to be registered as co-proprietor with his wife of such land;" but no provision was made for taking the name of the husband off the register upon his death. Sec. 39 of the *amended* bill directs that the husband shall be described as co-proprietor in right of his wife, and on his death the original registry of the wife, with a change of name if necessary, shall revive. This new section provides for the case of the husband dying in the lifetime of his wife; but how if the wife should die first, and the husband not

be entitled to the curtesy of England? The case has been omitted.

To show the effects of tinkering, we will print sec. 39 of the original bill, and the corresponding section of the amended bill side by side.

ORIGINAL BILL.

Sec. 39. Where land is registered in the joint names of husband and wife, no registered *disposition* of such land shall be made until the wife has been examined by the Landed Estates Court, &c., and has assented to such disposition, after full explanation of her rights in the land, and of the effect of the proposed disposition.

AMENDED BILL.

Sec. 40. Where land is registered in the joint names of husband and wife, no registered *dealings* with such land shall take place until the wife has been examined by the Landed Estates Court, &c., and has assented to *such disposition* after full explanation of her rights in the land, and of the effect of the *proposed disposition*.

Now, the use of the term "*such disposition*," when no disposition has been mentioned before, is, to say the least, not very accurate.

Section 42 of the original bill No. 2, is divided into six subsections: of these *two* have been altogether omitted, and *three* have been amended in the corresponding section of the amended bill (sec. 43), which also contains *four* new subsections. The section defines the rules to be observed with respect to registry. The fourth subsection was to the effect, that no alteration should be made in the registered description of the parcels except upon the requisition of all parties interested, and upon the production of such evidence as the registrar should approve of. The omitted subsections (Nos. 5 & 6) are as follows:—No. 5, "The registrar shall not be compelled to recognize any description of any parcel other than the registered description;" and No. 6, "Where the description by which any parcel was originally registered is altered, each proprietor shall be *responsible* for the identity of such altered parcel with the parcel as originally described." What the draftsman meant by being "*responsible*" it is impossible to imagine; nor was it clear to whom "each proprietor" referred, or for what each proprietor would be responsible. The fourth subsection in the amended section provides, that no alteration in the parcels shall be made except under the order of the Landed Estates Court. No registered owner, therefore, would be able to sell a part of his estate without subjecting himself to the trouble, annoyance, and expense of resorting to this new Court of Chancery!

Three of the new subsections relate to succession duty. No transfer of any registered land, and no creation of a charge, is to

be made until a certificate has been obtained from the commissioners of inland revenue, that no succession duty is payable in respect of the land. The commissioners of inland revenue are required to give such certificate upon such declaration being made, or such other evidence being produced as the commissioners may require, and the registrar is directed to see that such certificate is duly obtained; but no transfer or charge once entered on the register is to be invalidated on the ground that the certificate was not obtained, or on the ground of any informality. These three subsections would not affect a lease, though it might be for a thousand years, at a peppercorn rent. The fourth new subsection provides that when an instrument, required to be attested by a solicitor, is executed out of England, it may be attested by a solicitor of the Court of Chancery in Ireland, a writer to the signet, a consul, vice-consul, or notary public.

By sec. 76 of the original bill No. 1, a scale of costs, to be paid to persons other than the officers of the registry, was to be fixed by the Landed Estates Court; by sec. 84 of the amended bill this scale is to be fixed by the Lord Chancellor, with the assistance of the Lord Justices and the judges of the Landed Estates Court; and the section moreover contains a valuable addition, namely, that the scale of costs may be based either wholly or in part on an *ad valorem* principle.

It is very remarkable that, even in the clauses relating to stamps, some amendments were necessary. The draftsman, had he taken the trouble to search for precedents, might have found plenty that would have served his turn, and saved him from bungling; for instance, in sec. 70, original bill No. 1, and sec. 74, original bill No. 2, it was provided that, when any fees are payable in respect of any document, a stamp denoting the amount should be *affixed* to the document. An impressed stamp is often found to be more convenient than one that requires to be affixed; and the *amended* bills provide that stamps may be *affixed or impressed*.

Some of the inaccuracies and defects which are to be found in the amended bills we have already noticed in the foregoing remarks; there are yet others—many others—a few only of which we now propose to consider.

Section 15 of bill No. 1 has been given *in extenso* in a previous page. The expression, "every purchaser for valuable consideration of the land mentioned in such declaration," in that section, is somewhat vague. The person whose title is established may, in the strict legal sense of the word "purchaser," be a purchaser for valuable consideration of the land mentioned in such declaration; does this section apply to him? The meaning of the

framer of the bill was, no doubt, that the section should apply only to a person who may become a purchaser *subsequently* to the date of the declaration, but the "well-considered," section does not express this.

Again in sec. 18 we find that "any trustee of land with power to sell, and any donee of a power of selling land, may, with a view to a sale, apply to the court for a declaration establishing his title to sell . . . and when a final declaration has been made, establishing the title of such trustee or donee to sell, *any purchaser*"—this time it is *any*, not *every* purchaser—"for valuable consideration of the land mentioned in such declaration, or of any part thereof, or of any interest in such land"—here again are the words "or in any part thereof" omitted—"shall be deemed to hold the same for the same estate, and with the same incidents, as if he had purchased the same for valuable consideration of a person who had obtained a declaration establishing his title to such land." The vagueness in this clause is even more striking than in sec. 15; for may not "any purchaser" be construed to mean any purchaser from a *cestuique* trust? Moreover, in sec. 18, the power to apply is given to *any* trustee, not to a trustee having a power of sale extending to the fee simple only; and consequently a trustee for sale of land of any tenure, or of any interest in land, may, according to the strict terms of the section, apply to the court for the declaration. What construction the Landed Estates Court, or a Vice-Chancellor, or the Court of Appeal in Chancery, or the House of Lords, would put on this section, we dare not presume to say.

The bill contains provisions with respect to the mode of application; the notice to be given by the court, &c., in cases where an application for a declaration of title is made. Sec. 21 provides that these provisions "shall apply to cases where the court proposes to execute a *conveyance* to a purchaser, with the substitution of the word 'vendor' for 'applicant' where the vendor is not the applicant, and of words relating to a conveyance by the court for words relating to a declaration of title." Let us apply this interpretation clause to one or two of the provisions. By sec. 6 the notice to be given by the court is, amongst other things, to invite persons interested in the lands to come before the court and establish their rights, "with a view of having the same reserved, or of proving that the applicant is not entitled to such declaration of title as aforesaid." Supposing the vendor not to be the applicant, persons will be invited by the court to come forward to prove that "the *vendor* is not entitled to a conveyance by the court." Again, sec. 7 provides that "the court shall, before taking any proceedings in the matter of such application, require the applicant to give such security for costs as the

court thinks sufficient." Should the purchaser make the application, he, we presume, should be the person by whom security for costs ought to be given; but if we apply the interpretation in such case, we find that the *vendor* is required to give such security. Now, no doubt in many cases a vendor might be willing to consent to an application to the court by the purchaser, upon condition of being put to no expense, and of his incurring no liability in the matter, and the purchaser would be willing to give security for costs; but this arrangement the court cannot entertain, for it has no option, but *must* take security from the vendor.

Section 46 provides that if, in the course of any proceedings before the court, any person intervening in such proceedings as principal or agent, shall, with intent to conceal the title or claim to land of any person other than the applicant, suppress any deed in his possession, or any fact within his knowledge, the person so suppressing shall be guilty of a misdemeanour, and upon conviction shall be liable, "at the discretion of the court by which he is convicted, to be kept in penal servitude, &c., or to be fined such sum as *the court*"—i. e., according to the interpretation in sect. 3, the *Landed Estates Court*—"may award; and any declaration of title in respect of such land or conveyance, made by *the court* of such land, shall be void as against all persons guilty of any such misdemeanour." Must not the expression "the court," be interpreted in the same manner throughout the section; and does it not appear, then, that the fine is to be fixed by the Landed Estates Court? It would be a somewhat novel experiment in our criminal procedure for a prisoner to be tried by one court, and the penalty to be named by another.

The next question that arises under this section is one of a peculiar nature. We all know that counsel and solicitors in large practice frequently have notice of facts, and indeed solicitors may be in possession of deeds, which affect the title to land; but which, having come to their knowledge or possession in the course of proceedings in other matters, it has hitherto been their duty to keep to themselves. Are they or are they not affected by this section? If they are, no applicant would be safe in employing counsel or solicitors who, from their extensive practice, would be most competent to advise and act for him.

Section 47 declares that if, in the course of proceedings before the court, any person intervening in such proceedings should (amongst other things) fraudulently alter any deed, will, &c., he shall be guilty of a misdemeanour. Hitherto, any person fraudulently altering a deed, will, &c., has been deemed guilty of a *felony*, (*Archbold's Pleading and Evid. in Crim. Cases*, 13th ed.,

477, 492.) In this section, we again find that "the court" is to fix the amount of the fine.

The Landed Estates Court may direct an issue to be tried before "any jury, for the purpose of determining any question of fact (sec. 83); and the decision of such jury (which might consist of five members in a county court) is to be conclusive on "all persons *whatsoever*," unless the Landed Estates Court otherwise directs (sec. 84). This is somewhat startling. Should an issue be tried by a jury before Lord Campbell, and the verdict be contrary to the evidence, or should the ruling of my lord be considered by one party as improper, it appears that no court other than the Landed Estates Court could direct a new trial; but that court, consisting of two judges (conveyancers of not less than ten years' standing, and who must therefore be excellent judges of such matters), may or may not set aside the verdict, and thus the functions of the court of Queen's Bench *in banco* would in these cases be completely delegated to two conveyancers of ten years' standing!

As to bill No. 2, previously to completing the transfer of land or of a charge, the registrar is required to give notice to the transferrer of his intention to complete the same (secs. 27—33); but when a charge is *created*, no notice is to be given to the registered proprietor. It seems to us that, if notice be necessary in either of the first-mentioned cases, it is equally necessary in the last.

The remedy of the proprietor of a charge under an instrument conferring a power of sale, is, that he may at any time, after a day to be mentioned in such instrument, transfer the land as if he were registered proprietor (sec. 20). Now let us consider the effect of this clause. In the first place, would the registrar be required to give the mortgagor notice of the proposed transfer? We think not; for, as the proprietor of the charge may transfer as if he were registered proprietor of the lands, the notice must be given to *him*. A registered proprietor, therefore, who may borrow money and give the lender a power of sale, might find himself deprived of his property without any notice whatever of the intention of the mortgagee to proceed to sale, and without being required to pay the mortgage money; for there is no provision in the bill requiring the proprietor of a charge to give the registered proprietor notice, although such a provision might easily have been inserted without affecting the title of a purchaser, in the same manner as a clause to the same effect is now inserted in all mortgage deeds containing a power of sale. Moreover, as we have already noticed, there is no implied covenant for payment of principal or interest; and the consequence of these defects is, that no person could safely borrow,

and no person could safely lend, money on the security of registered land, without requiring an ordinary deed of mortgage to be executed in addition to the registered charge. Then the question arises, whether such ordinary deed of mortgage would require an *ad valorem* stamp? The 17th section provides that the instrument of mortgage shall be stamped in the same manner as if it were an unregistered mortgage. Now, if this instrument falls within the description of any of the instruments charged with *ad valorem* duty on mortgages under the stamp acts, the special enactment would be unnecessary, and therefore it must be concluded that it does *not*, in which case the additional ordinary mortgage deed would not come within the provision for the exemption from such duty contained in the 55th Geo. III., c. 184, tit. "mortgage," which is to the following effect:—Provided always that, where several distinct deeds or instruments, falling within the description of any of the instruments charged with the said *ad valorem* duty on mortgages, shall be made at the same time for securing the payment of the same sum of money, the said *ad valorem* duty, if exceeding £2, shall be charged only on one of such deeds or instruments, &c. Thus we apprehend the mortgage deed, as well as the registered charge, would be liable (at least the commissioners of inland revenue would hold such to be the case) to *ad valorem* duty.

A transfer of registered land, or of a registered charge, may be made by endorsement on the land certificate, or on the certificate of charge, or by such instrument as the Landed Estates Court may from time to time direct (secs. 25 and 31). The instrument of transfer is to be delivered to the registrar, and detained by him, (secs. 26 and 32). The land certificate, or certificate of charge, must, if the instrument of transfer is endorsed thereon, necessarily be handed over to the registrar; but, supposing that the Landed Estates Court should direct that a transfer may be made by an independent instrument, there is no provision in the bill which requires the land certificate, or certificate of charge, to be delivered to the registrar. This omission would preclude the Landed Estates Court from permitting a transfer otherwise than by indorsement.

Secs. 35—43, relate more or less to the transmission of land and charges. They are in many respects extremely defective. The draftsman does not appear to have contemplated the possibility of two or more persons, not trustees, being registered as joint proprietors. Suppose a registered proprietor should devise his land to A for life, with remainder to B in fee, the persons who ought to be registered are A and B as joint proprietors; for there can be no reason, in so simple a case as this, for the intervention of trustees. Should A die first, his name ought to

be erased altogether; but none of the clauses seem to be exactly applicable to such a state of affairs; they all seem to have been prepared with a view of appointing new trustees. Moreover, there is nothing in the bill which expressly declares whether two or more joint proprietors, in the absence of a memorandum on the register, are to be treated as tenants in common, or as joint tenants. Here, again, the case of trustees alone has been contemplated.

We must next consider how leasehold interests would be affected. A leaseholder may, with the consent of the registered proprietor, or by an order of the Landed Estates Court, put a notice of his lease on the register (sec. 48): as no man would be so foolish as to take a lease from a registered proprietor without binding him to consent to an entry of such notice, this clause would probably so far work well. But let us suppose that the leaseholder desires to sell his lease. He could find no purchaser without proving that notice of his lease is on the register, and the bill provides no means of proving this. The leaseholder is not entitled to require any certificate from the registrar of the entry of the notice, nor can he inspect, or authorize any other person to inspect, the register; he may, if he can, procure the permission of the landed proprietor for that purpose (which we hardly need say would in most cases be refused), or he may apply to the Landed Estates Court for an order to permit inspection, but the court is not bound to give it to him. Surely the leaseholders of England ought not to be placed in such a position as this, by which their property may become unmarketable? Again, suppose P the registered proprietor leases to A, who underlets to B: B cannot put a notice of his underlease upon the register, because between him and P there is no privity. P buys A's lease, and has it surrendered to him, and applies for the withdrawal of the notice. What will become of poor B, of whose underlease there can be no notice on the register? The Landed Estates Court is to make rules for the withdrawal of notices of leases; but is it fitting that parliament should entrust to *any* court the power of making rules which may not sufficiently provide for the safety of a single underlease in the kingdom? Is the vast amount of underleasehold property in England to be trifled with in this manner? Why not as well leave the whole of the detail of registration to the court? The difficulty in this case arises from dealing with the subject of registration in a piecemeal fashion. Had leasehold property been included in the scheme, there would have been no difficulty, where now there appears to be an almost insuperable one. We cannot see how any leaseholder could be permitted to withdraw notice of his lease without coming before the Landed Estates Court, and

proving either that no underlease had been granted by the original lessee, or any person claiming through him, or that every underlease which may have been granted had expired; and we certainly do not see why leaseholders should be inconvenienced and put to expense in dealing with their property, in order that a supposed benefit may be conferred on freeholders.

Next with regard to cautions. The effect of a caution (sec. 51) would be, that the registrar could not register any dealing with the land until he had served notice on the cautioner. After the expiration of twenty-one days after the *date* of the *notice* (not after the day upon which the caution may be served), the caution is to cease, unless an order to the contrary be obtained from the Landed Estates Court; but by sec. 52, if before that time the cautioner, or some one on his behalf, should appear before the Landed Estates Court, that court may, upon a bond being entered into for indemnifying every party against any damage that may be sustained by reason of the delay, make an order on the registrar, requiring him to delay registering any dealing with the property for such further time as may be mentioned in the order. If a cautioner should happen to leave England, or should happen to have a brain fever, or should otherwise be prevented from attending to business, what would be his position? "Every man should, as soon as he enters a caution on the register, direct letters from the land registry to be sent to his solicitor," is the answer. Good; there would be no great hardship in this. But who is to appear before the Landed Estates Court and petition for delay, and, beyond this, who is to enter into the bond? The cautioner's solicitor? We do not think that many solicitors would be kind enough to undertake such a slight liability. No; it is perfectly clear to all except the framer and supporters of this miserable bill, that the system of cautions as carried out would be a dead failure, would work great injustice, and would afford facilities for fraud and cheating, which persons like those whose histories are told in the volume entitled "*Facts, Frauds, and Failures*," would avail themselves of largely. These remarks apply in some measure to the system of cautions in bill No. 1, but not to so great an extent; for there the Landed Estates Court could protect the absent in the same manner as the interests of a purchaser are now protected by his counsel and solicitor; but the Landed Estates Court would have no power over cautions on the register, except such as would be given by the act. It is not to be supposed that persons will enter up cautions without just cause. In the first place, the caution must be supported by an affidavit; and in the next, if a caution be lodged without reasonable cause, the cautioner would be liable to pay damages. For

our part we cannot see why it should not be the business of the registered proprietor to procure the cautions to be removed, and why it should not be left to *him* to petition the court, which could then protect the cautioners as it might think proper.

Section 68 is as follows:—"No purchaser for valuable consideration shall be affected by the omission to send, or by the non-receipt of, any notice by this act directed to be given." If this clause is meant to apply only to a purchaser of registered land or of a registered charge, from a registered proprietor or mortgagee, it is unexceptionable, and ought to have been, though it was not, inserted in the original bill. To show how necessary the section is, we would observe that the title of every purchaser from a registered vendor might have depended upon the fact of a properly addressed letter having been sent to the cautioner; the mistake or negligence of a clerk in a name or an address, or in duly posting a letter, might have deprived a purchaser of his estate, without even leaving him any remedy under covenants for title. And these were the measures which were to give a purchaser an indefeasible title! When we read in the reports of the Postmaster-general, that numbers of letters are, in the course of the year, posted even without any address at all, and that such letters frequently contain bills and other valuable property, and are despatched, not by illiterate or ignorant persons, but by merchants—who usually manage their business far better than government officials manage theirs—were we to expect that the clerks of the Landed Estates Court, or of the Land Registry, would be infallible?

But we think that the term "purchaser for valuable consideration," may be held to include others besides the purchaser of the registered land or charge. Suppose a registered proprietor holds the land in trust for X, and A purchases for valuable consideration from X; or if A should have a judgment against the registered proprietor, obtained for value, or should sell his judgment to B; or if A should be one of Sir Hugh M'Calmont Cairns's secret mortgagees for value, or should sell his interest to B—would not A or B, in any of these cases, be a "purchaser for valuable consideration?" and if the registered proprietor should then sell, but A or B (as the case may be) should not receive notice of the intended sale, would they be bound? Certainly not, according to the legal meaning of the word "purchaser," which is not, so far as we can see, in any way restricted in the bill. Need we add that, under such circumstances, these bills for giving and perpetuating indefeasible titles would (should they ever become acts) be but snares and delusions to entrap the unwary, and those who confide in the ambitious but reckless experiments of men who, alike ignorant of the law as it is,

and as it ought to be, are too vain to seek information at the hands of the really learned and experienced lawyer.

The bills abound in minor inaccuracies; for instance, the word "land," to which a particular meaning is given by 13 & 14 Vict., c. 21, s. 4, ought to have been used in all cases in these bills, and yet we frequently find the word "lands" employed.—[See Bill No. 2, secs. 6, 8, &c.] No interpretation of the expression "The Court" is given in Bill No. 2, and yet that expression will be found to occur in Bill No. 2 as often as the term "Landed Estates Court;" and this discrepancy is all the more puzzling, as in some sections "The Court" is used to signify a court other than the Landed Estates Court.—[See secs. 62 and 63.] Then in sec. 14 of the amended Bill No. 2, we find an "estate in fee simple" called a "state in fee simple," the like error having occurred in the corresponding sec. 13, in the original bill from which it was copied.

With respect to the forms in the schedule, we may remark that but one form of charge is given, and that one contains a power of sale. Section 85 declares that the forms *shall* be used in all matters to which they refer; but there is no power to vary the forms, or to omit any part of any one of them. The Landed Estates Court may *alter* any of the forms, but cannot make additional forms; and consequently there is, and can be, no short form of a charge without a power of sale.

We have now given specimens of some few out of the multitude of inaccuracies and defects in the details of these bills. To specify all of them would be useless, and indeed impossible, without devoting more space to this subject than can be allotted to it. We have, however, mentioned a sufficient number to prove that it is untrue that these measures were well-considered before they were brought forward. The brilliancy of the popular speech of the Solicitor-general, referred to at the outset, was derived from the habit which a skilful advocate acquires of getting up rapidly (for the purpose of making a telling effect) a brief prepared for him, and which brief may be indifferently on the right side or the wrong one. The case he opened so plausibly has, so far as the evidence is concerned, failed miserably. If, unhappily, he had forced his bills through the legislature, they would have been wretched abortions, and have done more harm to the cause of genuine reform of the law, than six clever

Solicitor-generals, all making "brilliant" speeches, could have remedied.

"It is not re-assuring," observes the writer of the Letter¹ numbered four at the head of this article, "to find, that instead of a great measure, such as you have in hand, having been maturely considered, and deliberately weighed, and tested in all its parts, your bills turn out to be off-hand productions, the clauses and provisions of which shift and vary from day to day." Such being the case, what proof is there, we would ask, that the *principle* embodied in these bills has been more maturely weighed and considered than their details? We know that the registration commissioners, in their report of 1856, gave it as their deliberate opinion, that the introduction of such a Landed Estates Court as Sir Hugh M'Calmont Cairns now proposes to introduce here, would not be advisable; on the other hand, with all due respect for Sir Hugh's talents, we are bound to say that he has not, in the details of these bills, displayed so profound a knowledge of real property law as to render his unsupported opinion on the subject of much weight. The commissioners say:—

"The conclusion to which we have come is adverse to the institution of a Land Tribunal, with judicial powers to decide conclusively upon all titles to land. Such a court may advantageously be established where estates generally are so heavily encumbered, that their owners can neither emancipate themselves from existing burdens, nor discharge the duties which attach to the ownership of land. The object, in that case, is to obtain altogether a new proprietary, and to provide for payment of debts; but the same principle is hardly applicable in a state of society where there is no paramount need of encouraging absolute changes of ownership, as contradistinguished from temporary charges or family settlements, and where a considerable portion of the property will, not improbably, whatever may be the state of the law, still remain in the same family."—(Rep. p. 17.)

And again:—

"We think a compulsory investigation of title, though only required as a preliminary to registration, would be highly objectionable; and we do not recommend it. It would involve, as has been pointed out in the evidence before us, the necessity of having every title to every

¹ This letter, it is understood, emanates from a conveyancer of the highest eminence, and merits perusal.

acre of land thoroughly investigated by a competent judicial tribunal. It would be distasteful to landowners, who would be very reluctant to disclose their titles, and it would occasion the bringing forward of many stale and ill-grounded claims—would give rise to litigation—and would, when completed, be of no practical benefit to any, except those who contemplated selling their estates.”—(Rep. p. 26.)

And further:—

“We do not think that in order to pass from our present system to a register of title, it would be necessary, as has been suggested, to create a jurisdiction in commissioners, applicable to all land, whether encumbered or not, similar to that of the Encumbered Estates Court in Ireland, by which an absolute or parliamentary title to the land subject to leases or tenancies, should be declared. On the contrary, we concur in the opinion of one of the witnesses who has given evidence before us, that to make a judicial or quasi-judicial examination of title an indispensable preliminary to admission to the register, would greatly narrow the benefits of registration. The expense alone of the examination, would exclude nearly all small properties; and the trouble and expense combined, would exclude many others. Defective titles would necessarily be excluded; and we do not see why a defect in the title to land, anterior to the introduction of registration, need deprive that land of the benefit of an improved mode of transfer subsequently.”—(Rep. p. 28.)

Now we freely admit that we have little confidence in commissions or commissioners. But it is not necessary for us to consider whether these Registration Commissioners did their work well or not; it is sufficient for our present purpose to know, that Sir Hugh M'Calmont Cairns thinks they did. Speaking of the report, he said:—

“With respect to that report I feel a difficulty in speaking in any terms which can justly convey to the House the very profound impression which its perusal has left upon my mind. * * * If we look at the names of the commissioners who took a part in that inquiry, I think they will carry the greatest possible weight with the House on a question of this kind. * * * We have adopted, and we propose to the House a scheme founded to a very considerable extent upon the report of this commission. I say to a considerable extent, because we confine our plan of a register of titles to those cases in which a declaration of title has in the first instance been obtained. I venture to think that if, at the time this commission made their report, they had possessed the knowledge of that which has since been done by this House with reference to Ireland, they also might not have been indisposed to confine their recommendations in the same way; and after devising means of purifying the title once for all, have

said that the registration should take its date from the purification of the title, and not to put the name on the register until a right and valid title should have been obtained."—(*Speech*, pp. 23, 24.)

Now, what has since been done by the House with reference to Ireland is this:—It "came to the conclusion, by a bill that was passed last session [1858], to arm the court, which before was called the Encumbered Estates Court, and now is called the Landed Estates Court, with power to give indefeasible titles to all purchasers, and to any owner of an estate who could prove a right to the possession, while at the same time its power with reference to the sale of encumbered estates was continued."—(*Speech*, p. 10.) But to give an already existing court new powers, and to create an entirely new court, are two very different things. In Ireland the machinery was ready, and no risk was run in applying it to new work. Even supposing that all the encumbered estates in that country had been disposed of, yet it would have been impossible summarily to dismiss the judges and officers of the court without pensions or compensation, and, consequently, the experiment was a fair and reasonable one. Should it fail, not much harm will have been done, or much extra expense incurred; and by ceasing to appoint new judges, and discontinuing the powers of the court, the whole matter would fall to the ground, and die a natural death. We cannot, therefore, think that the commissioners who were fully alive to the benefits conferred on Ireland by the Encumbered Estates Acts, would have been induced to recommend the adoption of the Irish system in England, solely because Parliament had thought fit to invest the Irish court with new powers.

But when the Solicitor-general introduced his bills he knew—or *ought* to have known—something more than he told the House. He admitted in committee on the 14th March last, that in the three months from November to February, during which the new Irish Act had been in operation, there had been only *two* applications for an indefeasible title under its provisions, and of these applications one had failed and the other was withdrawn. But, said the Solicitor-general, "How did that happen?

The rules framed by the court were published at the beginning of November, and they had afterwards to be maturely considered by the professional gentlemen who would be required to act under them before they could be finally settled." So far, therefore, from feeling any thing like disappointment that only two applications had been made to the court up to the beginning of February, the sanguine Solicitor-general was surprised that in so short a space of time after its constitution even two cases had been prepared and brought under its jurisdiction.

Now, to introduce into England the plan of granting infeasible titles because, in the space of three months, two applications had been made and had failed under a similar system in Ireland, seems to us clearly to prove that the principle and the details of Sir Hugh's measures were about equally well weighed and tested; and, so far from agreeing with Sir Hugh, we think that his reason for adopting a system diametrically opposed in principle to the recommendation of the commissioners, is insufficient, if not ridiculous; and that, had the commissioners been in possession of the facts alluded to, *they* would have said, "the success of the Landed Estates Court has not yet been sufficiently proved in Ireland to induce us to recommend its adoption in this country."

A. B., the writer of the Letter we have mentioned above, is not sanguine as to the success of Sir Hugh's plan, but suggests that it should be confined in the first instance to the county of Middlesex, and, if found successful, should be extended to the rest of England; for should the system when tried prove not to be successful, the disturbance would have been local only, and would be capable of being rectified, and the landowners of Middlesex would be amply compensated for the experiment by having got rid of their register.

This suggestion, coming as it does from a very high authority, is deserving of great consideration; but it appears to us that the experiment, unless there be a reasonable chance of its success, is one of too costly a nature to permit of its being attempted. The chance of success evidently must depend upon the solution

of the question, whether the evils attending the present system of conveyancing are so great, that landowners, not intending to sell or mortgage, would be induced to avail themselves of the new process, which to them must be an expensive one, may be a dangerous one, and would not after all lead to any present advantage. All who may desire to sell or mortgage without delay, would necessarily be excluded from making application under the act. Now these evils, says the Solicitor-general, are two :—

“The first is the length of time which at present must elapse between the making of a bargain and the completion of the purchase. We know how the purchase of all other kinds of property is completed. If you buy stock you do not require to be told how many hours are necessary in which to make the transfer. If you buy railway shares, in like manner you have your purchase completed and your money paid in a few hours afterwards. Perhaps the most extraordinary facility of transfer obtains in the case of ships. In five minutes, and at an expense of less than five shillings, you may make a contract for, and actually transfer, such a ship as the Himalaya or the Great Eastern.”—(*Speech*, p. 5.)

Mr. Hawkins in his very able pamphlet, says:—

“The office of a register is not to promote simplicity and cheapness of transfer, but notoriety. There appears to me a fallacy in supposing that there is any thing natural in a system of registration as applied to the transfer of property. Where there is a thing to be sold, the absolute property of the seller, it will most easily, as well as naturally, be transferred by a direct process from him to the buyer, without the necessity of both resorting to an office in London to complete the transaction. Registration, *quâ* registration, is only an impediment. The analogy of stock is cited. . . . The easiness with which stock is transferred is not caused by its being registered; it would be bought and sold still more readily, if, like a watch or any other chattel, it passed simply from hand to hand; but being not a corporeal thing, but a debt due to the owner from government, its transfer is effected by entry in the debtor's books, not for advantage, but of necessity.”

Mr. Hawkins is not quite correct here. It is not a matter of necessity that the transfer should be effected by an entry in the debtor's books, for the debtor may give a bond transferable to bearer, as is done sometimes by our own government, and very generally by foreign states with regard to their debts, and the transfer by entry is an advantage to the creditor, inasmuch as it affords him more security than he would obtain by means of a

bond, which may be destroyed, lost, &c. But we agree with Mr. Hawkins so far as this, namely, that the system of registration does not of itself *necessarily* tend to simplify transfers. "The case of ships," observes Mr. Hawkins, "is peculiar; a ship is required to be registered to ascertain its nationality; without a register it would pass by simple payment and delivery. Registration is in all cases an additional element introduced into the affair, and to be desirable, it must be shown to save more than it adds to the trouble and expense of selling the commodity."

The Solicitor-general, after having shown how easily stock and ships may be transferred—which Mr. Hawkins has shown might be more easily transferred if there were no register at all—turns to real property. He tells us that when an estate is bought, the purchaser cannot get possession of it until after a long lapse—sometimes no inconsiderable portion of a man's lifetime—spent in the preparation of abstracts, in the comparison of deeds, in searches for encumbrances, &c. "Not only months, but years, frequently pass in a history of that kind," says Sir Hugh, "and I should say that it is an uncommon thing for a purchase of any magnitude to be completed—completed by possession and payment of the price—in a period under, at all events, twelve months." Had Sir Hugh had any experience as a conveyancer he would not have made this extraordinary statement, which is entirely without foundation. A. B., whose practice as a conveyancer, it may be said, is more extensive than that of any other man in the kingdom, says:—"It is known to all lawyers conversant with such matters, that the average time between a contract and the completion of a purchase in England, under the present system, does not exceed three months; and that of the exceptional cases which exceed that average, in a considerable proportion the delay proceeds from the fact of the purchaser being unprepared with the purchase-money."—(*Letter*, p. 5.) And we can fully corroborate this statement, from the experience of others as well as of ourselves. So much, then, for the first of the evils.

The second of the evils, says Sir Hugh, is this:—A buys an estate, investigates the title, is satisfied, pays his money, and obtains a conveyance. A year or two afterwards, A desires to sell or mortgage, as the case may be; B is willing to become the purchaser or to lend his money, but before he can do so there must be a repetition of the whole process which took place upon A's purchase of the estate. B must have his own solicitor and his own counsel to investigate the title, because he cannot trust those of A.

This is no doubt an evil—a very great evil; but the question is—Is it essential, in order to do away with that evil, to introduce all the cumbrous and expensive machinery which forms the basis of Sir Hugh's plan? The answer is patent—It is not. "The parliamentary title," writes A. B., "and the new and somewhat formidable statute of limitations, are incidents which you found to be inseparable from your scheme; but they were not the objects you had in view, apart from the diminution of the cost and delay with which the transfer of land is attended"—(P. 3). Indeed Sir Hugh admits this, for he says:—"We all know that in practice, meagre as are the means at the disposal of conveyancers, such a thing is hardly ever heard of as a title passed by a conveyancer afterwards turning out to be a bad title"—(*Speech*, p. 13); and further, he believes that, "in point of fact, there are very few titles in this country which are not good"—(*Speech*, p. 21). But we can quote a somewhat higher authority on this subject even than Sir Hugh M'Calmont Cairns. Mr. Joshua Williams, in his evidence before the Registration Commissioners, said—"The case of a *bonâ fide* purchaser being evicted for want of title is exceedingly rare"—(Rep., p. 307). It is clear, therefore, that a system by which indefeasible titles can be obtained is not in itself required in this country. All that is wanted is some plan by which the continued re-investigation of back titles may be obviated. We do not believe that the actual transfer in the register would be less expensive than an ordinary conveyance is now. A conveyance at the present day is a very simple instrument, and, except as regards the stamps,

is inexpensive; and if solicitors' fees, under the new system, are to be calculated upon an *ad valorem* principle, the saving on this head would be inappreciable.

Mr. Hawkins objects altogether to any system of registration, but suggests certain reforms in the law of real property, which would doubtless tend to simplify titles. He proposes, for instance, that mortgages should be mere charges, not to be heard of after they have been paid off; that a testator should be empowered to appoint a real representative, in whom all his real estate should vest absolutely *virtute officii*, and a conveyance from whom should confer as good a title as a conveyance of personal estate from the executor does now; that a general power in trustees to give receipts should be implied; that the law which makes judgment debts binding on land in the hands of a purchaser should be modified, &c. We should be glad to see most of these reforms carried out; but we cannot agree with Mr. Hawkins as to the utter uselessness of a good system of registration. We think that the plan proposed by the Registration Commissioners was good in the main; namely, that "a registration founded on ostensible or possessory ownership, should be permitted in the first instance, and that on such a registration the antecedent title might be left to be the subject of investigation, until, by lapse of time or otherwise, that investigation should become unnecessary"—(Rep., p. 28). A well-drawn act, based on this principle, would undoubtedly in the end obviate the evil of our present system of conveyancing with respect to the re-investigation, upon every dealing with land, of the back title; and, moreover, if fraud and forgery could be sufficiently guarded against, would ultimately secure the landowner from the danger to which he is now liable of deeds being lost or mislaid. An argument used by some who are opposed to any system of registration is, that it would be a very terrible thing to collect in one place the documents of title relating to all the land in the kingdom. Suppose, say they, the registry office and all its books, papers, and deeds should be destroyed, what a misfortune that would be! Would landowners feel safe

with such a sword hanging over their heads? To this we answer, that we firmly believe landowners would be safer if their deeds were deposited in some secure government building than they now are. Does any holder of English securities think himself in a particularly unsafe position, because the books which contain the only evidence of his being entitled to the property in question are kept at the Bank of England? The title-deeds to eight hundred millions are kept there, and we cannot see why the title-deeds to the landed property of the country could not be equally well and securely kept in another building of a similar kind.

But to establish a registry such as Sir Hugh M'Calmont Cairns proposes would be worse than useless. The remarks of the Commissioners quoted above from that report, which made so "profound an impression" on Sir Hugh's mind, that upon the opportunity offering he prepared measures in direct opposition to its import, are in every respect applicable to Sir Hugh's plan. And when to the objections foreseen by the commissioners are added those to which the details of the second bill are open—such, for instance, as the necessity for an application to a Court of Chancery, under the name of a Landed Estates Court, upon the death of a proprietor or of a trustee, or upon the sale of a portion of a registered estate, or the entering up of a notice of a lease, or upon other like occasions; the necessity of obtaining a certificate that no succession duty is payable before any dealing with land by way of transfer or mortgage can be had, and the many other difficulties and obstructions put in the way of the registered proprietor and those claiming through him, or for whom he may be a trustee—when, we say, all these objections are added, it is to us a matter of profound regret, and must be so to every true law reformer, that Sir Hugh M'Calmont Cairns should have thought fit, upon his own responsibility, and without giving any sufficient reason, to bring forward measures embodying a principle against which a great part of the report of the commissioners is directed. Sir Hugh cannot lay claim to greater experience or a wider knowledge of the subject treated

than is possessed by some of those gentlemen; and as it is notorious that not a single real property lawyer of note, or conveyancer in large practice, was consulted as to either the principle or details of these measures, we cannot but think that, should they ever become law, they will either completely fail, and remain quietly in the statute book unnoticed, which would be a fatal blow to law reform; or they will lead to litigation, trouble, expense, injustice, and fraud, and, instead of proving a benefit to the country, will be the cause of ruin and misery to many.

Our remarks have already run to so considerable a length, that we can now do no more than commend to the perusal of those who are interested in the subject of registration, the Act (mentioned at the head of this article) which has established a land registry for the whole of the province of South Australia. Titles to land in Australia are far more simple than titles to land in this country; complicated settlements are unusual in the colony, and all titles can be traced back to grants from the Crown. The task, therefore, which the framers of the Act had to undertake, was not of that almost overwhelming difficulty which is found to attend the preparation of similar measures here; but the Act, though not perfect, is immeasurably superior as a specimen of careful legislation to the bills introduced into the parliament of the mother country.¹

In the Report of the Sub-Committee of the Manchester Law Association, we find the following remark:—"There is no need to discuss the bills in reference to any merely professional considerations. The bills will not reduce the business of the solicitor." It proceeds to say, the interest of the public only is professed by the Association to be their object. Now, we would suggest one word upon these remarks. The effect of the provisions in these bills upon the profits of the solicitor, or on the income

¹ A paper relative to the working of the Act has been laid before the Law Amendment Society by Mr. Torrens, the Registrar-General for South Australia. We shall recur to this paper and to the Act in a future number of this Magazine.

of counsel, it is obvious, ought not to be dragged into the question at all; but, nevertheless, we regret to say we have lately seen elsewhere appeals made to professional men, with relation to the subject of the bills, based entirely upon what we may (following the felicitous and variously interpreted language lately employed in the House of Commons) designate as "the professional aggrandizement and private advantage" of attorneys. To take, first, the lowest ground of protest against such an unfortunate line of opposition, we would say, it is *inexpedient* for any body of men thus to put forth selfish, personal, and pecuniary motives as those actuating them in a matter affecting the common weal. Is it likely to attract or disgust the client public to see the legal body complaining of a particular measure, because it will prevent them from deriving large emoluments from the pockets of those who employ them? The lawyers in both branches have great political influence in parliament; but if a barefaced and self-interested position like this were confessed or even suspected, it would infallibly lead in the Commons to consequences the very opposite to those desired by the persons who professed sentiments so foolish and mischievous. If the public could do without paying attorneys and barristers a per centage on their property for maintaining their legal rights and preserving for them in civil affairs what is equitable, it would be perfectly justifiable to set about abolishing courts of law, shutting up attorneys' offices, and turning Lincoln's Inn into a "public recreation ground," the Temple into a "penitentiary and reformatory" for either sex, and Gray's Inn into "baths and washhouses."

The impolicy, then, of such a trades'-union complaint, resembling more the machine-breaking intelligence of the operative of a quarter of a century since is obvious; but taking the higher ground—that of social morality—it is clear that, for one division of society to claim a right to aggravate the misfortunes of the rest, that they may make larger profits out of them, and levy legal taxes and permitted imposts out of their hard-earned gains, is as barbarous and atrocious as the system of plunder of the old

robber knights on Father Rhine. If the medical profession were to insist upon disease being disseminated by act of parliament, and pestilence being perpetuated and malaria encouraged, because doctors had a prescriptive right to a certain per centage on the earnings of the community—although these pretensions should be supported by the undertaker, sanctified by the clergyman of the cemetery, and approved by the shareholders—society would not agree to it, and none would be so ready to try the right as members of the legal profession. They would argue that the police had an equally valid vested right in crime, and the surgical-instrument maker in corporeal deformity. Such a course of dealing with the subject of law reforms is, therefore, degrading to those who profess to be citizens as well as lawyers, and we dismiss it with our hearty contempt.

Parliament and the public have, since the 11th day of February last, been, to use Mr. Christie's language,¹ in a "fool's paradise," from expecting that a great and beneficial change in the present system of conveyancing was at hand. Now, the Solicitor-general has been, during the late session, constructing, and for a short time residing, in *his* Eden. By "fortuitous" and political mischances he has been for a period drawn out of his pretty temporary garden; and without even having had, it would appear, the opportunity of tasting of the tree of knowledge. We trust that the flaming swords of some competent legislative angels will save him from the trouble and disgrace of again showing his nakedness, or his more indecent flimsy covering in the blessed region of real property law reform.

We may remind our readers that a genuine reform in the law of real property was introduced into the Upper House of Parliament, not by a young and inexperienced authority, but by Lord St. Leonards, the great real property lawyer of the age—a reform against which not a word has been said by any lawyer of repute, but which, it is admitted on all hands, would have had a most beneficial effect. What has been the fate of this bill? "Scarcely a line has been vouchsafed by any of the

¹ Report of Reg. Com., p. 327.

newspapers to a notice of this measure, much less to any comment upon it; and yet the good that it will effect is, perhaps, greater than that of any measure which has been introduced in the law of real property since the acts passed at the recommendation of the commissioners of 1828.”¹ Alas! these remarks were written at a time when it was hoped and expected that Lord St. Leonards’ bill would be passed. It was accepted by the Lords; but in the Commons, on the 8th April last, the Secretary to the Treasury stated that the bill “seriously affected the interests of the Crown and the revenue departments,” and that it would be more convenient that the bill should be withdrawn and brought forward in a new parliament. The Attorney-general weakly acquiesced in this suggestion, and with “unfeigned regret” withdrew the bill. Of course, if the Treasury is determined to stick to a system which all practical men have condemned for years; namely, that of rendering real estate in the hands of a purchaser liable to Crown debts and succession duty, which no innocent purchaser ought ever in justice to be called on to pay, any endeavour to reform our real property law may as well be abandoned at once. Here, we think, the laws of real and personal property might properly be assimilated. If you buy stock, you do not require to be told that it is unnecessary to inquire whether any legacy, or succession duty, or any other debt is owing, or *may become* owing; to the Crown by the proprietors from whom you purchase the stock, and the reason for keeping up the distinction is certainly not obvious to any but Secretaries to the Treasury. But the members of the government were not warm supporters of Lord St. Leonards’ bill—probably for the reason that it was not a government measure—and that they did not care to fathom or could not comprehend its merits; nor would it, they might possibly believe, bring credit on themselves—they could make no political capital out of it.

We have, in fact, been experiencing the evils of a government too weak and incapable to adopt or institute any useful or prac-

¹ Remarks, &c., issued by the Manchester Law Association.

tical measures themselves, but strong enough to barricade to others the proper avenues to legislative reform. The great drums have been beaten, but the drummers have been as hollow as the drums. It is not for us to say how much this sad spectacle results from ignorance, or how far it has been a "game of speculation."

We do not conceal our opinion that the delusions (of which we doubt not he himself was also a victim) attempted by Sir H. M'C. Cairns to be practised on the Commons are, politically and socially, both a blunder and a crime—a *blunder*, because the short-lived "brilliancy" of the parliamentary orator will be forgotten, whilst the falseness of the pretensions put forward will long be remembered: brumagem diamonds may once cheat the confiding customer, but what becomes of the character and future trade of the cheap jeweller?—a *crime*, because possible and real improvements of judicious reformers have been retarded, and confidence has been shaken in the good faith, probity, and ability of public men who profess to devise and carry out the rational requirements of the public.

Notes of Recent Leading Cases.

DIVORCE AND MATRIMONIAL.

1. **SMITH v. SMITH** (28 L. J. Prob. and Mat. Court, 77)—Petition by Wife for Dissolution of Marriage—Desertion—Decree of the remedy of Judicial Separation. 230

COMMON LAW.

2. **SCOTT v. DIXON** (Hil. Term, 1859, Q.B.—Not yet reported)—Liability of Directors of Public Companies for Misrepresentations—Fraud—Publication of Reports by Directors—Evidence. . . 230

1. **SMITH v. SMITH.** 28 L. J. Prob. and Mat. Courts, 77.

Petition by Wife for Dissolution of Marriage—Desertion—Decree of the remedy of Judicial Separation.

IN the above case the wife petitioned under 20 and 21 Vic., c. 88, s. 27, for a dissolution of marriage, on the ground of adultery, coupled with desertion, without reasonable excuse, for two years and upwards; and the prayer of the petition was simply for a dissolution of the marriage. The respondent did not appear. The court (which was composed of the Lord Chancellor, Mr. Justice Wightman, and the Judge Ordinary) held that the adultery was proved, but that the desertion was not, as there were circumstances in the case leading to the belief that the petitioner and her husband parted by mutual consent. The Court was of opinion, however, "that although the petitioner may pray a dissolution of marriage, yet it is competent for the Court to grant such relief as the facts proved would warrant." A judicial separation was therefore decreed, and the husband condemned in costs.

2. **SCOTT v. DIXON.**—(Hil. Term, 1859.—Not yet reported.)

Liability of Directors of Public Companies for Misrepresentations—Fraud—Publication of Reports by Directors—Evidence.

TIME was when directors of public companies were assumed to be nearly, if not quite irresponsible, for all that they said or did whilst seated behind the board-room door. When great

companies failed, and gross frauds were found to have been committed by managers and directors, they escaped with comparative impunity. But then came the Royal British Bank swindle, and the law was awakened, and the public, laying to heart the verdict of "guilty" which in that case was returned, by a natural re-action began to think that they could hold any and every director of a company liable for every inaccurate statement made by any director or officer of that company as to its affairs.

The case of *Scott v. Dixon*, having been also cited in support of the above opinion, we now purpose giving an account of it, not so much on the ground of its involving any new doctrine in point of law, but to expound clearly for what class of misrepresentations, and on what evidence, the defendant in that case was held responsible.

The action was brought by John Scott and Robert Robinson, against Joshua Dixon, one of the directors of the Liverpool Borough Bank. The plaintiffs, by their declaration, sought to recover of the defendant damages for certain false representations as to the solvency and affairs of the bank, alleged to have been fraudulently and deceitfully made by the defendant to the plaintiffs, to induce them, and whereby they in fact were induced, to purchase shares in the bank, the purchase-money of which shares they lost, the bank being insolvent and the shares worthless, and in respect of which shares they were compelled to pay certain calls made after failure of the bank, as a contribution to its losses.

The defendants pleaded, 1st, not guilty; and 2nd, that the plaintiffs were not so induced as in the declaration alleged. The false representations complained of were contained in a report (set out in the declaration) presented by the directors to the shareholders on the 28th day of July, 1857, which was as follows—

" LIVERPOOL BOROUGH BANK.

" Board of Directors for the year 1856.—William Rathbone, Esq., Chairman; Christopher Hind Jones, Esq., Deputy-Chairman; Edward Benn, Esq.; Duncan James Kay, Esq.; John Cropper, Esq.; David Lamb, Esq.; Robert Crosbie, Esq.; Joseph Rater, Esq.; Joshua Dixon, Esq.; James Ryder, Esq.; Robert Ellison Harvey, Esq.; Thomas Sellar, Esq.; John P. George Smith, Esq., Manager.

" REPORT OF THE DIRECTORS TO THE PROPRIETORS.

" According to the last report, the paid up capital of the Bank was £900,000, and the reserve fund was £101,775, 10s. 11d.

" Since that date two calls of £1 per share have been paid upon the new shares, making the capital £1,000,000.

"The nett profits of the past year, after payment of all expenses of management, and after deducting £45,825, 2s. 1d. for losses by bad debts incurred during the same period, amount to - £69,312 12 8

Appropriated as follows—

3½ per cent. dividend upon £950,000 -	£33,250	0	0
2½ " " " £1,000,000 -	25,000	0	0
Property tax paid by the bank - - -	3,629	6	8
		£61,879	6 8
Balance carried to reserve fund - - - - -	£7,439	6	0

"Nearly the whole of the losses above-mentioned have been caused by the frauds of a customer.

"In winding up the affairs of 1854, a year which it is well-known was most disastrous to those customers of the bank who were engaged in the colonial shipping trade, heavier loss has been sustained in the realization of the assets then taken over by way of security, and in the liquidation of estates then considered good, than could possibly have been anticipated.

"The directors have thought it their duty at once to reduce the dividend to the rate of £5 per cent. per annum, on the grounds that, taking the most favourable view of the liquidation of these accounts, the whole of the reserve fund will be required to meet the losses incurred; and that, on the other hand, taking the most unfavourable view consistent with probability, the good current business of the bank will, in their opinion, be sufficient to admit of the regular continuance of the dividend without encroaching on the capital at the same period in the ensuing year.

"In laying this statement before the shareholders, the directors desire strongly to impress upon them that its unsatisfactory character is to be attributed to the affairs of 1854, and that, apart from these, the sound and legitimate business of the bank would have enabled it to pay the ordinary dividends, and also to add largely to the reserve fund, notwithstanding the losses that have been incurred subsequently to that year. They wish also to state their confident expectation, that the change they are making in the policy and regulations of the bank will effectually guard against the recurrence of similar results.

"Mr. Smith having stated to the directors that his health would not longer permit him to undergo the labour of conducting the details of the manager's duties, and having in consequence requested to be relieved from his office, they have with reluctance complied with his wish, and have made arrangements that Mr. Thomas Sellar, who is in every respect eminently qualified for the post, shall, from the 1st of August next, assume the position of manager. Mr. Smith has, at the request of the directors, consented to take a place at the board, and to continue to give the bank the aid of his valuable assistance.

"The directors who go out of office by rotation are Mr. Rathbone, Mr. Dixon, and Mr. Benn, who are eligible for re-election.

"Proprietors legally exempt from the income tax, will be furnished with a certificate of the proportion due on their shares, on application to the manager.

"WILLIAM RATHBONE, Chairman."

The cause was tried at Liverpool, on the 26th August, 1858, before Mr. Baron Martin.

The plaintiff's case was (according to the statement of his counsel, Mr. Edward James), that the defendant was a managing director of the company, having been appointed a director in 1854, and a managing director in July 1857, at the time the report of July 1857 was published, and had concurred in its publication; and that that report was false in its statements as to the solvency and affairs of the bank, on, amongst others, these grounds:—

1. That the paid up capital of the bank was not £1,000,000, but £936,000.

2. That the report, by stating that a dividend was to be paid in respect of the half-year's profits, £69,318, 12s. 8d., induced the public to believe that the bank was in a sound financial condition; whereas the fact was, that though there might have been that amount of profits for that *particular* half-year, there was upon the *whole* account a deficit; the dividend, therefore, being in fact paid out of capital.

The plaintiffs further contended, that the defendant knew that such report misrepresented the facts; that such report was addressed not only to the shareholders, but to the public generally, and was intended to deceive them by concealing the state of the bank, and induce them to believe the bank to be in a sound financial condition; that the plaintiffs received the report, and, on the faith of its being true, bought ten shares in the bank, in August 1857, the damage to the plaintiffs being, that they lost the purchase-money of the shares, which were valueless (the bank failing on the 27th October, 1857), and were obliged, in respect of such shares, to pay calls made after the failure of the bank, as a contribution towards its losses.

In support of the case of the plaintiffs, the following evidence was given.

The above report of July 28, 1857, was put in.

The plaintiffs themselves were called, and proved that in August they applied to Mr. Brown, a stockbroker, for a report of the bank; that he procured the report of July 28; that *in consequence of reading that report*, vouched by the names attached to it, they bought ten shares in the bank; that the shares became valueless when the bank stopped, and that they had to pay calls as a contribution to losses.

Mr. Tinley, a sharebroker, was called, and proved that he

had dealt in shares of the Borough Bank; that brokers always obtained the reports, such as that of the 28th July, upon making application to the bank, and as a matter of course; and that the value of the shares was generally determined by the reports.

The stoppage of the bank on the 27th October, 1857, was admitted

Certain reports of accountants appointed by the liquidators, of whom defendant was chairman, to investigate the affairs of the bank, were relied on, to shew that the whole capital of £1,000,000 had not been paid up, and that it appeared from the books that the bank was in an unsound state at the time the report of the 28th of July was issued. This evidence was objected to by the Attorney-general, but admitted by the judge, who observed, the whole question was the state of the defendant's mind on the 28th July, 1857. That so far as any thing since published could affect that question, the jury would give it due weight, but not suffer themselves to be led away by it from the actual question at issue.

To show the defendant's connection with the report, and his knowledge of the misrepresentation, a printed report of a meeting of shareholders, held on the 25th of February, 1858, was relied on, at which meeting the defendant made a speech containing the following passages—

"I cannot but feel that the position in which the directors are placed is one of very great discredit, and I wish as fully as I can to explain my part in the direction." After alluding to one particular item of loss, the defendant said—"It was then, for the first time, that I became aware that the managing directors had almost as little control over, or knowledge of the affairs of the bank, as the outside directors. Towards the end of June last, Mr. Cross called upon me in London, and stated that Mr. Smith was going to resign, and he asked me if I would become a managing director. I assented. Immediately on my return to Liverpool, my first step was to inquire into the condition of the bank with respect to the declaration or non-declaration of a dividend. The statement of the affairs of the bank, laid before me by Mr. Smith, led me to the conclusion that no dividend ought to be declared. This view of the case was assented to at a meeting of the directors; but at a meeting afterwards, suddenly convened, the decision was reversed—(Mr. Woodward, 'By whole of Board or by part?')—by the Board, and to which I yielded; the motive being that it was very dangerous in the then position of the bank, to run the risk of the excitement that might be produced by the non-declaration of a dividend: it might have resulted in a run, and the stoppage of the bank. I acceded to it, only on the understanding recorded in the minutes, that the statement to the shareholders should contain a full and correct disclosure of the position of the bank, even although it

should disclose the fact that the dividend was declared out of capital." In consequence, a resolution was drawn up by the defendant as follows :—"That a dividend of $2\frac{1}{2}$ per cent be declared—it being understood that the statement to the shareholders at the annual meeting is to be a true and correct representation of the affairs of the bank, as far as it goes, whatever may be the result."

The defendant, then admitting his connection with the report actually made to the shareholders, viz., the one in question, of July 28, 1857, said of that report—

"The report that has been presented, well-examined shows the fact, although I do feel that it does not make the statement in the broad terms that would have been adopted if the intention had been to state that there was a very handsome surplus."

At the close of the plaintiff's case, the Attorney-general (Sir F. Kelly) submitted that there was no case to go to the jury; that there was no fraudulent misrepresentation by the defendant in the month of July; and that the representation was addressed to the shareholders and not to the plaintiffs.

The judge said—"I don't think I can say there is no evidence; but, Mr. Attorney-general, if you will consent to leave the case here, I will give you leave to move, that is if you do not call witnesses."

The Attorney-general, however, elected to proceed.

On the part of the defendant he contended—That the capital was paid up, or that defendant believed it so to be; that there were profits to the extent stated in the report of July, during the half-year therein alluded to; and that the report was so far true. That as to the statement of losses made to the defendant by Mr. Smith, the manager (hereafter more particularly alluded to), it was only an estimate of possible loss, and did not represent the amount of debts absolutely lost. Further, that Mr. Dixon acted in good faith in making the report, believing its truth; that the report was not calculated to mislead and induce people to purchase shares, for that on the face of it it was unsatisfactory; that the report was not addressed to the public at large as a recommendation to purchase shares, but was in fact on the face of it an apology to the shareholders for the non-payment of the usual dividend; and that it was not a representation to the plaintiffs, merely because the directors permitted it to be published.

The defendant was called as a witness, and after speaking to his appointment as a director, and as managing director, and to the fact that only the managing directors and the manager knew, or could verify the state of the bank's affairs; and also to his having, when an outside director, expressed his dissatis-

fuction at the small amount of information given in the matter to the outside directors, and after speaking to his having applied to Mr. Smith, the manager (as being the "person who knew most of the affairs of the bank"), about the losses, and of Mr. Smith's having made a statement to him about the losses, or as he, the defendant, contended, the possible losses, of the company,—amongst other things said, alluding to what he did after his appointment as managing director, and after his conversations with Mr. Smith, as follows:—

"I proceeded to consider whether a dividend ought to be declared on the current half-year. I put down my conclusion in figures. The figures are in my handwriting." [The figures were £334,000 and £301,000, and the deficit was then stated to be £33,000.] The defendant continued, "I added £25,000 to this at a subsequent period. This made a total deficit of £58,000." He proceeded, "I communicated it to the whole body. A draft report was drawn up by the manager. I do not know what has become of it. This was early in July; I attended a meeting on the 4th of July; it was a full meeting. I mentioned my views that there ought to be no dividend. I stated that it was based on calculations furnished to me by Mr. Smith. The majority disagreed with me, and resolved upon a dividend. I myself continued to be of the same opinion as before. It was stated by Mr. Smith, he was under the impression that the customers of the bank and the shareholders would be much alarmed by the non-payment of a dividend. I said that paying dividends out of capital was a logical absurdity, which if they pleased they might commit, provided they placed upon record a minute that the so doing should not interfere with giving to the shareholders a true and correct statement of the affairs of the bank. I drew up a draft resolution¹ to that effect, which was read. The report was prepared in a form different from that ultimately published."

This draft report, here referred to by the witness as having been prepared and not published, ran as follows:—

"In winding up the affairs of 1854, a year which is well known as most disastrous to the customers of the bank who were engaged in the colonial shipping trade, heavier loss has been sustained in the realization of assets then taken over by way of security, than the directors could have anticipated, and than the large provision already made for that purpose will meet. While the directors entertain no doubt that the policy of taking over these assets was one by which the interest of the bank was best consulted, they regret to inform the shareholders, that the result of a careful revision of these assets leads them to declare that the reserved fund can now no longer be considered an item to the credit of the bank, and that the further amount required to meet their losses, if realized at once, would absorb about 58 per cent. (£58,000) of the capital of the bank.

¹ This was the resolution before referred to at p. 235, commencing "That a dividend of 2½ per cent. be declared, it being understood," &c.

"Under these circumstances, the directors were in doubt as to the propriety of paying any dividend for the last half-year, but conclude to do so, on the ground that the business of the past year, taken by itself, warranted their doing so, and that it was advisable to spread the losses arising from the affairs of 1854, over a future period, rather than expose the shareholders to the inconvenience of the intermission of any dividend, which some of them might feel perhaps very severely. The directors do not see any more impropriety in this course, than in that of an individual, after an unfortunate year's business, supplying his necessary expenses out of his trading capital, provided always that the fact of this being done is fairly and honestly laid before the shareholders."

The witness then continued thus :—

"A discussion took place upon it" (that is the draft report just set out), "it was decided it should be set aside. They did not like it. I concurred in the resolution. Finally, I waived my objection, *and concurred in the report actually presented*" (the report complained of, of 20th July, 1857).

The defendant said of this last report, "I believed the statement in the report to be true. I believed all the statements made to be true." Again he said, "I did know what Mr. Smith told me; but I did not know the state of the bank as disclosed afterwards by Mr. Banner's report."

The Attorney-general wished to put in two reports of directors, dated in 1837 and 1838, containing the following extracts :—

1837.—"It may be proper here to remind the proprietors that the internal management is essentially that of a private bank. With the exception of one only, appointed by the directors out of their own body, it is conducted by the chairman and managing director, no other having access to the pecuniary transactions of the customers, thus combining the secrecy of a private with the security of a joint-stock bank."

July 31, 1838.—"One other point only remains to be mentioned—the internal management. This remains as before, being exclusively confined to the manager, assisted by the directors, who alone have access to the details of the bank."

On being asked by the presiding judge for what purpose he tendered this evidence, the Attorney-general said he tendered it to meet the strong remarks of Mr. Edward James, that every attempt had been made to shuffle all responsibility on to the shoulders of the manager and one or two of the managing directors.

The learned judge rejected the evidence.

The learned judge told the jury that, in order to sustain the plaintiffs' case, the report must be false, and to defendant's knowledge, and made by him with a fraudulent intention to deceive

and mislead, and made with the intent to deceive and mislead the plaintiffs. If they believe Mr. Tinley, as every broker could get a copy, obviously for the purpose of showing it to persons most likely to deal in shares, it would be for the jury to say whether the report primarily made for the proprietors was not also made for the consideration of persons wishing to deal in shares.

Ultimately the jury found for the full amount claimed by the plaintiffs.

In Michaelmas Term last the Attorney-general, on behalf of defendant, moved for a new trial, on several grounds:—

1. That there was no evidence for the jury of false and fraudulent misrepresentation.
2. That the verdict was against weight of evidence.
3. That there was no evidence of any representation made to the plaintiffs that the report was true.
4. That the reports of the directors of 1837 and 1838 were improperly rejected in evidence.

A rule *nisi* was granted on all the grounds.

The rule was argued in the following Hilary Term, before Lord Campbell, C. J., and Justices Wightman, Crompton, and Hill. The able arguments of Mr. Edward James, Q.C., against the rule, and of the Attorney-general in support of it, deserve attention. They were confined principally to the particular facts of the case, to which we have already adverted; and we have, moreover, already presented them briefly, but perhaps sufficiently, in narrating the points relied on at the trial on both sides respectively. What additional matter it is desirable to introduce to the reader's notice will be fully gathered from the extracts from the judgments, which we proceed to subjoin.

The rule was discharged by the unanimous judgment of the Court.

Lord Campbell said:—

"I really feel great pain upon this question, because I look upon Mr. Dixon as a gentleman to be considered as still an honourable man, and I do not think that any permanent stigma is attached to his character, but I think in this transaction he has been over-persuaded to do what is wrong.

'Video meliora,' &c. &c.

The declaration imputes to him that he knowingly concurred in a report that he knew to be untrue, and that he did so with the intention of deceiving. I am sorry to say, I think in this case that has been proved against him. The report, I think, amounts to this—that the dividend of five per cent. was for that half-year to be paid out of profits, and that hereafter in all probability it would be paid out of

profits; and that this bank was in a fit situation to award the dividend of five per cent. on the 28th July, 1857. Certainly this declaration is not against him for concurring in a dividend, but it is for representing that that dividend was paid out of profits, and that the bank was in a situation safely to make such a dividend."

His lordship then, after observing that he thought the report in question amounted to such representation, thus proceeded:—

"Was that the true state of the affairs of the bank? Most undoubtedly it was not. Upon that there is no dispute that this was incorrect; it was untrue. The next important question is—was this incorrect and untrue to the knowledge of Mr. Dixon?"

His lordship then read over and commented on the statements made in Mr. Dixon's speech in February, 1858, and other evidence already referred to, and observed of Mr. Dixon's statement that that report, "well examined, showed the facts" (*i. e.*, the actual state of the bank); and of all the arguments adduced to prove that it did so, his lordship disposed by asking, whether "it was fair that it should require a very microscopic inspection of this sort?" and expressed a decided opinion that it did not disclose the true state of the bank. Then, after alluding to the conflict—the doubts—the more than doubts—that the defendant admitted existed in his mind at the time the report of July was published as to what really ought to have been done, his lordship said:—

"Still he concurred in this report. Now, with what view does he do so? I say he does so for the sake of the bank, but regardless of the interests of those who were to deal with the bank; that it would be very much for the benefit of the shareholders, of whom he was one, that this substituted report should be published, instead of the more genuine report, and he concurs in that. Why does he concur in it? Nay, the fair inference is this—that he concurs in it because he believed that it would not alarm; that it would not prevent people from continuing their deposits in the bank; that it would not prevent people from buying shares in the bank. Is not that a fraud, although he might believe that if the bank went on prosperously, and made £100,000 a year, that ultimately it might prosper and become a successful speculation? In the case of the directors of the British Bank, I had occasion to lay down, and I believe that that was not considered as a misdirection in point of law, to the jury, that if it was the intention of the directors to publish what they knew to be untrue, for the purpose of inducing persons to buy shares in the bank, that they were guilty of doing what was wrong, and might be indicted for a conspiracy, although they might have believed at the time, that by a successful career the bank might ultimately be solvent; but publishing an untrue statement of the condition of the bank, for the purpose of inducing persons to become purchasers of shares, and running the risk of the

bank becoming bankrupt, was what the law would not allow, and those who did so were subject both to civil and criminal proceedings. The next point that we are to consider is, was this representation made to the plaintiffs?" His lordship, after stating that no doubt the directors knew that this report would be read by other brokers, and all persons dealing in shares, and acted on by them, and that such reports are generally published for such purposes, and after commenting on the evidence of Mr. Tinley, said—"Therefore, I have no doubt whatever, that the allegation in the declaration, that the representation was made to the plaintiffs is most completely established."

As to the alleged improper rejection of evidence, his lordship thought it was, looking to the grounds on which it was tendered, properly rejected, and added—"But I do not think, if these reports had been read, they would have weighed a feather in the case."

Mr. Justice Wightman gave his judgment to the same effect on all the points; to the following observation we particularly draw attention:—

"Under those circumstances it seems to me that, although in what Mr. Dixon really did, he may not have intended in the ordinary sense of the word to commit a fraud, still there is the fact that there has been a false representation, and that he, knowing it to be false, it was put out by him for the purpose of creating a false credit, and giving a false credit to the bank. He did that, therefore, which is charged as fraudulent in the declaration."

Mr. Justice Crompton also gave judgment to the same effect on the law of fraudulent misrepresentation; his lordship said:—

"There can be no doubt about the law. . . . It is quite established by the cases, that if a party publishes what he knows to be false, if that is to be acted upon by the public, and the public or any individual acts upon it, whatever may be the motive or the publication of the statement so made, the person who is injured has a right to say—you have defrauded me. In this sense it is morally wrong. As to the rejection of evidence complained of, the learned judge intimated that for certain purposes the evidence would have been admissible; but that, as the case stood, all that the defendant was charged with, being the knowledge he derived from Mr. Smith, and his access to the books for the few days after he became a managing director, it was immaterial. He further observed, that in his opinion the judge who presided very properly asked for what purpose the evidence was tendered, and having relation to the answer given, very properly rejected it. His lordship further said, I think it would be very unfair and very dangerous, when an offer of evidence is made in that way, so that the counsel on the other side loses the opportunity of objecting to it—which they would have seized if it had been offered on its true and real grounds—to permit parties afterwards to come and say this is admissible in another point of view, and ask us to disturb the verdict on that ground."

Mr. Justice Hill entirely concurred as to the representation having been made to the plaintiffs, though addressed to the shareholders of the bank :—

Upon the report complained of, his lordship said, "Now can any fair and dispassionate man, looking at this report that was afterwards published, say it conveys the information to an ordinary reader, or to a reader of ordinary understanding, that the dividend was paid out of the capital? On the contrary, it is put in such language as to lead to the conclusion, that in a favourable view, or a favourable construction of the affairs of the bank, nothing more was required to satisfy the losses than the reserved fund; and certainly, looking at it as a whole, no one could fairly say that it would lead to any other conclusion, and that the dividend was not paid out of capital.

"But it appeared in evidence that the report so published was left at the bank, and that the sharebrokers, who were employed to buy and sell shares in that bank, as well as in other matters in Liverpool, whenever they required information with regard to the affairs of the bank, went to the bank, and the reports were handed to the shareholders. The plaintiff in this case having a small sum of money to invest, and being minded to invest that money in the shares of the Borough Bank, goes to his broker and asks his broker to obtain for him one of the reports. The broker goes to the bank, and, in the ordinary course of the practice of the bank, there obtained the report in question, handed the report over to the plaintiff; the plaintiff reads and considers it, and acts on the faith of the contents of that report, and is induced to buy the shares.

"Now there is no doubt on the facts I have stated, that undoubtedly, although the report was primarily a report made to the shareholders, yet it was intended by the directors—who desired that the shares of the bank should maintain a good value in the market—it was intended by the directors for the information of every person who was disposed to deal in the shares, and any person who, according to the ordinary practice of the bank, was so minded, might obtain that report at the bank, and the representation contained in that report was a representation made to the person so obtaining the report."

From the above account of this action, which, because of its value, we have presented thus early to our readers, they will perceive that, as illustrating the important principles ably discussed by the bar, and finally elucidated by the bench, *Scott v. Dixon* is likely to become a "leading case."

Notices of New Books.

[*.* It should be understood that the notices of new works forwarded to us for review, and which appear in this part of the Magazine, do not preclude our recurring to them at greater length, and in a more elaborate form, in a subsequent number, when their character and importance seem to require it.]

A *Hand-book on the Law of Marriage and Divorce*. By Robert A. Pritchard, D.C.L., Barrister-at-Law, and W. T. Pritchard, Proctor in Doctors Commons. London : Stevens & Norton, 1859.

FORTUNATELY, the title of the above work is a "*Hand-book*." Had it been a "*handy book*," however sweet the critic's temper naturally may be, it could not have been proof in this case against the growing and fashionable nuisance of misnomers, of which Lord St. Leonard's successful work has been the innocent cause. It is called, however, a "*hand-book*," which, though not a very happy title, shews better taste and more wisdom than many recent godfathers of law books have shewn. If, however, we may remark, titles are to be derived from the members and organs of the body, while it certainly gives a greater scope to our literary nomenclature, what we gain in extent we may lose in perspicuity, unless a common understanding is come to, as to the limits of the meaning of the terms. Thus, an "*eye-book*" might be held to signify a work which one might just glance at; a "*foot-book*" one of an ephemeral kind, which, having cursorily examined, the reader will kick out of his library. We have seen also, we think, music-book employed for raising very juvenile performers on the piano to an appropriate height; these, though the task would not be graceful, might receive a becoming classification.

Mr. Pritchard's "*Hand-book of Marriage and Divorce*" is not like Mr. Murray's "*Hand-books for Travellers*," which chattily shew the tourist how he should proceed when he leaves home. The roads to matrimony, and the modes of escaping from it, are not laid down in this legal publication; the expenses of the journey are not tabulated, nor is advice as to what "*couples*" are to see, seek, or avoid, tendered. The "*Hand-book of Marriage and Divorce*" is, in fact, an ample octavo volume, containing an excellent and useful *Digest* of the Statutes relating to these subjects, and of the cases in the old ecclesiastical and the modern "*Divorce and Matrimonial Causes Courts*." It further contains a collection of precedents in use, and notes of practice.

If we have any quarrel with the title of the book, we have none with the book itself. The arrangement of the matter seems excellent. The index of the subjects, and that to the cases, are full and complete, and adapted, as they ought to be, to the wants of the practitioner. It

is, in our opinion, a work which they who practise in Sir C. Cresswell's court will find a necessary "shelf-book" or "table-book," or "court-book;" or, if Messrs. Pritchard will still have it so, a "Hand-book."

Reports of Cases in the Court of Probate, and in the Court for Divorce and Matrimonial Causes. By M. C. M. Swabey, D.C.L., and T. H. Tristram, D.C.L. London: Butterworths.

RENEWED acquaintance with these reports, since their first publication, enables us to speak favourably of them. Imperfect reports are useless; inaccurate reports are mischievous; unauthorized reports, however carefully and correctly executed, suffer under the disadvantage of not being received in court as conclusive. If the lawyer is misled (as we have known him to be) by the latter, the blame is thrown upon his shoulders, and so he cannot dispense with the costly volumes of the regular reports. The reports by Dr. Swabey and Dr. Tristram being essential under the new régime, alike for the library of the lawyer frequenting the common-law courts, as for him of Lincoln's Inn, it is satisfactory to be able to say, that we perceive, independently of their own proper merits, and having regard to the usual scale of prices in England, the amount of matter rendered for the money seems liberal—for the page is fuller than in some reports.

It is but due to the publishers to mention this, as the impost for reports is found to be not a trifling point with many of our profession.

The Practice of the Court of Probate in Common Form Business, &c.

By Henry Charles Coote, Proctor in Doctors Commons, and the Practice of the Court in Contentious Business. By T. H. Tristram, D.C.L., Advocate in Doctors Commons and of the Inner Temple. Second Edition. London: Butterworths, 1859.

MR. COOTE was early in the new field of practice opened up by the recent Probate Court Act, and he produced a good treatise, which we reviewed at the time. He has done well to bring out, in conjunction with Dr. Tristram, the second edition, with the additions and alterations, necessitated by the progress of law. Since the publication of the first edition of the above work, two amendment acts have been passed, "The Probate Cause Act, 1858," and the "Confirmation and Probate Act, 1858." A new set of rules has also been issued. References will be found in this edition, we believe, to all the reported decisions of Sir Cresswell Cresswell, upon points of common form, as well as the directions to the officers of the court, given by this distinguished judge, to whose learning and ability the successful working of the new court is mainly attributable.¹

This work of Mr. Coote's will be found especially useful in practice, as he has given full directions for obtaining probates and administra-

¹ The only opinion adverse to this which we have seen, is in a recent pamphlet, equally foolish and scurrilous, and emanating obviously from one who is the victim of excessive vanity.

tions, and for altering and re-sealing them ; and a valuable collection of original forms of oaths, affidavits, citations, and other instruments. This description of the present edition must suffice ; for the book is one of practice, and affords little opportunity for particular criticism. Our general criticism amounts to—and it is the most favourable we can offer of any book of the kind—a commendation of it as an excellent book of practice.

Dr. Tristram's treatise on the contentious practice of the court, constitutes also a valuable feature of the volume.

The Universal Review of Politics, Literature, and Social Science.

London : Allen & Co. March and April 1859.

WE advert to this new monthly periodical, not because it directly concerns matters legal, but because we think, judging from the tone of the two numbers which have already appeared, that it is likely to be a publication interesting to many of our readers. For the most part, the ephemeral monthly literature has, we think, degenerated during the last twenty years ; or, it may be, the taste and requirements of readers of periodicals have been elevated, and have outgrown their former food. One never hears of people who read "the monthlies" nowadays, excepting always the two leading publications. The managers of the *Universal* propose to themselves to emulate the *Révue des Deux Mondes* in the special cultivation of genuine criticism, extending over fields about which educated men and women of the present day profess to know and care somewhat. Much of the quarterly literature is weighty, without being satisfactory. The interval between the publication of successive numbers is too long for some purposes, and too short for others. The "Universal," aspires, so far as we can at present judge, to literary qualities not inferior to those of the ancient Quarterlies, while it means to superadd a more lively, rapid, and active vigilance over contemporary doings—literary, political, and social. The social science attributes of the new undertaking will, we hope, be a strong point in its conduct. To our colonists and expatriated friends, who now can obtain oftentimes "*bi-monthly*," as it is termed, their books and letters, and who retain their interest in what is doing in the social and literary world, we think we can commend the *Universal Review*, on trial at least.

1. A Handy Book on the Law of Bills, Cheques, Notes, and I. O. U.s.
By James Waller Smith, Esq., LL.D., Barrister-at-Law. London : Effingham Wilson.
2. A Handy Book on the Law of Private Trading, Partnership. By the same Author and Publisher.

ONCE for all, we protest against any more "Handy" books. This pirating of titles is at the least in bad taste. It is spreading beyond the book trade. The other day we saw recommended a "Handy Foot Bath." But having protested against the title of these little shilling works, we must admit their virtues. The first has reached

its eleventh, the next its second thousand. They are not intended for the legal practitioner, but for the commercial and general public; and as compendious and cheap statements of certain rights and liabilities, they have considerable merit. Although very few professional persons will procure or use Mr. Smith's little works, they may certainly recommend them to any lay friends who are curious to learn something about the subjects he has treated of.

AMERICAN LAW LITERATURE.

SEVERAL important text books emanating from American jurists are now before us. We can do little else on this occasion than briefly describe their contents and give our readers some notion thereof, and of their value to English lawyers. In almost every instance the subjects are ably treated, and will be found of value to the *practitioner* in this country even. But to those who take a more liberal view of their profession than that of its bread-producing power, and who desire to keep before their eyes the scientific aspects and various phases of jurisprudence—to observe the different application of the principles which the systems of both countries have in common—to notice in what instances conflicts of opinion in the courts of America or England arise, and what arguments are employed and may be raised in support of our brethren on the other side of the Atlantic, and in what measure they may be adopted here under analogous circumstances; in short, to all who are concerned to be well informed on matters legislative, judicial, or jurisprudential, the learned productions we are now alluding to must prove both interesting and useful. To some of the volumes which we now proceed to notice, we shall hereafter refer at length, for the purpose of considering them more elaborately, especially in their bearings and influences on English law.

A Practical Treatise upon the Law of Railways. By Isaac F. Redfield, LL.D., Chief Justice of Vermont. Second edition. Boston: Little, Brown, & Co., 1858.

CHIEF JUSTICE REDFIELD published in 1857 his work on railways, and the following year a new edition was required. His aim was to supply a volume, not over cumbersome, upon the whole law relating to railroads both English and American. With this view the author desires to embrace under the scope of his book every case which has been decided in both countries, but in such a form as not to convert his treatise into a Digest. This indeed appears the proper mode of treating "cases." Mere statements of principles, without the illustration from authentic instances which have been reported, make small impression on the reader, and are of comparatively trifling practical utility; whilst the huddling together of marginal notes, after the manner of a digest, is useful only on certain occasions, and then to those alone who are conversant with the subject.

Mr. Redfield has had to consider upwards of three thousand reported cases, which alone will indicate the labour which has fallen to his lot, and that which he has saved practitioners who may have to advise upon and determine, often in haste, points of law in connection with railways.

We do not purpose now to analyse Chief-Justice Redfield's work ; but there is one point which we cannot forbear noticing in connection with American railways ; and that is, how it happens there are any railways at all in that country to write about—how any one can be found to spend money on their construction ? The author observes (p. 5), that it is worthy of remark that “in the United States a large proportion of the capital invested in railways has proved hitherto wholly unproductive, and much of it has already proved a hopeless loss, and a very small proportion of the whole can be said to have been at all remunerative.” Great Britain and Ireland can unfortunately produce some instances, we believe, where a railway is unproductive ; and occasionally ordinary shareholders have received no dividend, and many instances of a 10 per cent. dividend dwindling to a 4 per cent. might be recorded—but as a rule, English railways pay, and are believed to be solvent. After comparing the railway facts of the two countries, we are strongly inclined to agree with the learned judge, that “it is difficult to account for the difference in results without suspecting there is *something wrong somewhere*.” The author is led to make this remark in considering a case in America, in which was discussed the right of legislative control over private corporations, whose functions are essentially public, like those of banks and railways. He is himself in favour of control within reasonable limits, and under proper restrictions. That such is imperatively demanded in America, seems to us, we confess, obvious : that it might be with advantage extended in England, is also, we believe, the better opinion.

In 1857, the United *Kingdom* possessed upwards of 8000 miles of iron road. In 1851, the United *States* had created double this mileage and as much again was in progress. In the United *Kingdom* these works had cost upwards of 300 million sterling ; in the United *States* they had spent about half this sum. So they had half our capital, and more than double our mileage, and yet the companies are mostly insolvent. Now the English debenture and preference stock is said to pay an average of 5 per cent., and ordinary stock 3 per cent. Most of the European railways are also highly remunerative, returning from 7 to 20 per cent. Supervision, without undue interference, is assuredly requisite for the protection of shareholders. No one knows this better than the English lawyer—whether solicitor or counsel—who has had to watch the manœuvres of directors and their agents in railway proceedings.

A Treatise on the Construction of the Statute of Frauds as in Force in England and the United States. By Causten Browne, Esq., Counsellor-at-Law. Boston : Little, Brown, and Co., 1857.

WHETHER it be true or no that every line of this statute is "worth a subsidy," as Lord Nottingham used to say, is open to discussion. The late John William Smith in his "*Law of Contract*" has observed, that there is no doubt as to every line having *cost* a subsidy in litigation. The question has recently been raised anew by able thinkers, whether the enactment has advanced justice, or whether its successful operation in preventing "many fraudulent practices, which are commonly endeavoured to be upheld by perjury and subornation of perjury," has not been counterbalanced in certain directions by its effect in frustrating fair claims and maintaining dishonest defences.

The jurisprudence of America, however, has retained the enactment; and it is of equal importance there as it has been and is with us. Mr. Browne, the American writer on jurisprudence, has formed an opinion in favour of the beneficial effect of the statute. He says, "In estimating the value of this enactment, the important question is, not whether the statute has in its practical working let in as much perjury as it has excluded, for no strictness of legislation can bar out from a court of justice the man who deliberately purposes to commit perjury; but it is whether, in the average of large experience since the statute was enacted, the requisition of written testimony in certain cases has not materially served to secure the property of men against illegal and groundless claims. That it has done so will scarcely be disputed, and to the profound practical wisdom with which it was conceived to this end, the most enlightened judges and jurists have at all times borne emphatic testimony."

"Nevertheless it cannot be said to have been judicially administered with a firm hand and in a consistent spirit. Within a few years after its enactment, and before the generation of its framers had passed away, we find the courts admitting exceptions and distinctions as to its application, and forcing upon it constructions tending to restrict its beneficial operation. In later days there has been evinced, on the whole, a disposition to return to a closer interpretation of its provisions; but even now there are doctrines too firmly settled by precedent to be overthrown, which, from their very inconsistency with the spirit of the statute, lead continually to great embarrassment in its administration."

Embarrassment, however, was in the first instance caused by the opportunity afforded for divers interpretation of the meaning of the statute, through laxity in the language employed therein; for in truth, the composition of the Statute of Frauds, however excellent certain of its provisions may be, proves that modern draftsmen have not the exclusive right to be considered imperfect in their art. In the 29th year of the reign of Charles II. even, we have an instance of an ill-drawn bill, turned into a suit-provoking statute. The difficulty which has attended the exposition of the statute, results mainly from the imperfect language employed by them who framed it. "The pro-

fessional reader," says the author, "who carefully examines it from beginning to end, will find such obscurity of arrangement, and such inexact and inconsistent phraseology, as to conclude that safe and rational rules for its construction can hardly be rested upon its literal expressions; but that it must be read, as far as may be, by the light of that broad and wise policy in which it was manifestly conceived." With respect to the authorship of the statute, Lord Ellenborough in *Wain v. Warlters*, insisted to a great extent on his construction of the word "agreement," because he believed that Lord Hale drew the bill, who was "as competent to express as he was to conceive the provisions best calculated for carrying into effect the purposes" of the law. This was not the view taken by Lord Mansfield, who remarked that the act was not passed till after Lord Hale's "death, and was brought in in the common way, and not upon reference to the judges." Again, we find Lord Nottingham remarking, in his account of his judgment in *Ash v. Abdy*, 3 Swanst. 1664 (Anno 1678), "I said I had reason to know the meaning of the law, for it *had its first rise from me*, who brought the bill into the Lords' House, though it afterwards received some additions and improvements from the judges and civilians." In the note by Mr. Swanston he says, "that the fact above-mentioned sets the origin of the statute beyond question, though there may be some foundation for the tradition that Sir M. Hale and Sir L. Jenkins assisted in its preparation." Still, whoever revised the draft, it was left eventually in an informal state. The general design of the statute is clear, and some parts of it are happily worded, but others as carelessly; for example, the same term is found used therein to express different ideas, and the reports supply abundant evidence to shew that it was not left *perfected* by any great hand, though it may have been touched by several masters. However, both we and our legal brethren in America have the duty imposed upon us to understand the meaning and interpretation of the Statute of Frauds, and Mr. C. Browne's book will be found useful for the purpose of attaining this object.

Commentaries on the Law of Marriage and Divorce, and Evidence on Matrimonial Suits. By Joel Prentiss Bishop. Third Edition. Boston: Little, Brown, & Co., 1859.

THE Statute 20 and 21 Vict. c. 85, has not removed the necessity of the ancient law of marriage and divorce being thoroughly mastered by the English practitioner (vide § 22). But it has rendered it desirable that the principles on which it is founded should be both more widely and thoroughly understood. There is now and will be greater freedom and scope in the application of the law than formerly. Mr. Bishop says truly, that when practitioners resort to the reports, they find there the light so scattered, so buried beneath forms of practice unknown to them, gathered at so much labour as often to render the search in this direction scarcely compensatory." Like Mr. Bishop's commentaries on criminal law, the volume which we are now noticing is not a mere digest of cases or statement of decided

points—it professes to be and is an original *commentary*. It aspires to be a text-book in which authorities are considered, accepted, rejected, or expanded, and where principles and rules are laid down, and the intention and application illustrated and explained. The writer does not shrink from accepting the responsibility which independent views naturally throw upon an author. The work deserves, and we hope will receive, at our hands hereafter, ample notice. The author believes that his “English and even Scotch friends may find,” in his treatise, “not an altogether valueless reflection of the light which has shone from them over the waters.” It is because what we have already observed in the volume in question induces us to think Mr. Bishop is not mistaken in this belief, that we have introduced—thus briefly—his labour to our readers’ consideration.

A Treatise on the Law of Attachment in the United States. By C. D. Drake, of St. Louis, Missouri. Second Edition, with the Treatise on Foreign Attachment in the Lord Mayor’s Court of London. By John Locke, Esq., Q.C., M.P. Boston: Little, Brown, & Co., 1858.

THE following remarks occur in this preface to Mr. Drake’s work: “The materials here wrought together are almost wholly American. Great Britain, the fountain of, and exercising continually a marked influence over, our jurisprudence generally, contributes in this department comparatively nothing. In that country the bankrupt law, and the process against the body, leave little room or occasion for a general system of attachment; while the limited proceeding under the custom of London gives rise to few cases which find their way into the courts of Westminster Hall. Here, however, where no general bankrupt law exists, and imprisonment for debt is to a great extent abolished, it is widely different.”

If imprisonment for debt be abolished, for which step many are now agitating—the practice of attachment must, we presume, become as extensive here as in America.

Mr. Drake’s book would have been more valuable to the English lawyer if the decisions or the sections of the Common Law Procedure Act, 1854, giving attachment of bills of the Garnishee (sects. 61-67), had been referred to.

Mr. Locke’s excellent little treatise on Foreign Attachment in the Lord Mayor’s Court in London, has been appropriated by Mr. Drake in his appendix, and forms a useful addition to his volume.

State of New York. First Report of the Commissioners of the Code. Albany: Weed, Parsons, & Co., 1858.

THE Commissioners, whose first report is now before us, were appointed by an act passed in 1857, by the Legislature of the State of New York, to reduce into a systematic code such of the laws of that

state as were not comprised in the codes of civil and criminal procedure already completed.

The laws of the state have been arranged under two great general heads, namely, substantive and remedial laws ; or, those which define the rules relative to property and conduct, and those which prescribe the modes of enforcing such rules. The latter are comprised in the Codes of Civil and Criminal Procedure, and the codification of the former has been committed to the present commissioners, Messrs. David Dudley Field, William Curtis Noyes, and Alexander W. Bradford, of whom one at least is well known in this country. They are directed to divide their work into three portions : one containing the political code, another the civil code, and a third the penal code. The political code is to embrace the laws respecting the government of the state, its civil polity, the functions of its public officers, and the political rights and duties of its citizens. The civil code is to embrace the laws of personal rights and relations, of property, and of obligations. The penal code is to define all the crimes for which persons can be punished, and the punishment for the same. These three codes are not to include the laws relating to courts of justice, or the functions or duties of judicial officers, or any provisions concerning civil or criminal actions, or special proceedings, or the law of evidence, all of which are comprised in the codes of Civil and Criminal Procedure.

The present report, made in February, 1858, is accompanied, as ordered by the act, by a general analysis of the projected codes: This analysis, though it is but a mere dry list of the heads of law, clearly shows that those who compiled it have set not only earnestly, but also scientifically, to work.

Hasty and undigested legislation, moreover, is not contemplated by the commissioners ; for they say, that while they "are duly sensible of the importance of having the work done with all reasonable despatch, and of the pressing need of some portions of it at the present time, they are also aware of the necessity of proceeding with deliberation, and submitting no portion of the code till it has been carefully considered. Not only must each part be prepared with care, but its relations to the other parts must be examined, before it can prudently be admitted."

The propriety of introducing changes in our statute law simultaneously with the consolidation of that law, has, of late years, been much discussed in this country ; the opinion of great American jurists on the subject will, we think, be read with interest, and as the following passages apply equally as well to a system of consolidation as to one of codification, we extract them from the report :—"How far," say the commissioners, "in the preparation of a code changes should be recommended, is a question of much delicacy. They should, without doubt, be cautiously admitted. Law is the growth of time and circumstance. An original system of jurisprudence, founded upon mere theory, without reference to national characteristics, habits, traditions, and usages, would be a failure. The science of government and law is progressive ; new regulations spring from necessity, or are

suggested by experience, and the application of the rules of justice to human affairs is constantly modified by the changing circumstances of society. The process is easily understood. In the earlier stages of civilization, when communities are small and isolated, local customs are more distinct, in conformity with local character; but as cultivation and intercourse gradually break down provincial peculiarities, and eradicate partial customs, the tendency to assimilation enables the legislator to disregard inconvenient rules, venerable only from age and habit, and gradually to introduce changes, which have the experience of other communities to recommend them, and which seem better adapted to an advanced civilization. We thus reach a stage in which valuable improvements may be borrowed from other systems and engrafted into our own, without impairing the harmony of our laws by the introduction of unsuitable elements. For example, the law of special or limited partnerships, the offspring of the commerce of the middle ages, unknown to the common law, has within a recent period been adopted into our own legislation with manifest advantage. So we have also seen the influence of our jurisprudence reflected back upon the country from which we derived our language and our laws; and reforms, readily admitted by our plastic legislation, slowly adopted there, after having been tested by our experience; though the settled constitution and the fixed habits of England might have prevented their origination in that country. Thus, two great purposes are to be subserved in revising the jurisprudence of a nation; one, the reduction of existing laws into a more accessible form, resolving doubts, removing vexed questions, and abolishing useless distinctions; the other, the introduction of such modifications as are plainly indicated by our own judgment, or the experience of others. We are satisfied that this work should be performed with delicacy, caution, and discrimination, that nothing should be touched, from the mere desire of change, or without great probability of solid advantage."

We anxiously await the completion of these codes. The jurists of America have already taken a high position in respect of the science of jurisprudence; and as the codes, before being presented to the legislature, are to be distributed for examination among the experts of the state, and after being subjected to their criticisms, are to be re-examined and reconsidered by the commissioners, we believe a code of laws will be produced, which will not only prove a lasting honour to the state itself, but may, we hope, rank along with that of Justinian or Napoleon, and be a benefit as an example to the mother country.

We must not close this notice without mentioning that the services of the commissioners are gratuitous. Not even one of the three receives a salary of £1000 a-year.

Courts of Requests. *A Practical Treatise on their Constitution and Procedure, &c.* By Louis Nell; Colombo, 1858.

By looking at the bottom of the title-page of the above-named work, we perceive that the Court of Requests treated of therein are those of Ceylon, some of which are situated in the districts of

Onodorowe (which is in the southern division of Nuwerakalawiya) of Oodiyancoolam, Akurapatoo and Tittewelgandohaye Corle, Valyelademben, and other places, whose names are as well known as they are easy to read and pronounce.

The procedure in the Courts of Request, and the practice followed in the places which sound so curious to the European ears, and which we have as a curiosity given above, are not likely to be of great interest to our English readers; nor is the case of *Appoohamy v. Punchyhamy* likely to be cited to the astonished Barons of the Exchequer.

But the work deserves to be noticed, first, because it exhibits the scope and operation of small debts court in Ceylon, and secondly, as affording an example of the very careful and praiseworthy labour of its author; and lastly, as being a specimen of admirable printing and getting up. In this latter point, indeed, we are astonished to see so good an example issuing from a colonial press.

Recueil Général de Traités, Conventions, et autres Transactions remarquables, servant à la connaissance des Relations étrangères des Puissances et États dans leurs rapports mutuels. Continuation du grand recueil de G. F. de Martens, par Charles Samwer. Tome XVI. Partie 1ère. Gottingue, Dieterich, 1858. (D. Nutt, Strand, London.)

MARTENS's collection of treaties, &c., is well known all over the continent. There are thirteen volumes of the work which bear his name, and the part now before us is the first part of the third volume of Samwer's continuation. It contains a collection of treaties, conventions, and mutual regulations made and agreed upon between various nations from September 1846 to June 1857. We cannot say that it is a *complete* collection, for there are some treaties which have found no place in it, and we may instance, among others, the treaty of 1849, between Austria, Modena, and Parma, agreed to by the Pope in 1850, relative to the free navigation of the river Po; the convention of 1854, between Great Britain and Sardinia, for the reciprocal opening of the coasting trade; a similar convention of the same year between Great Britain and Tuscany; and the copyright convention of 1854, between Great Britain and Belgium.

There is also a defect in the collection which requires notice; namely, that, with few exceptions, one text only of the treaties is given; the French text, in cases where there was one, being usually selected. In the construction of treaties reference to more than one text is frequently necessary, and the omission of the various texts somewhat detracts, we think, from the usefulness as well as the completeness of the work.

In the part now published there are several treaties of considerable interest, *e. g.* :—the treaties entered into in the years 1850-52, between Sardinia, and Austria, Great Britain, France, Belgium, Holland, Portugal, Greece, Switzerland, Bremen, Lubeck, Hamburg, &c., which

are evidence of the vast efforts at that time made by Sardinia for the extension of her commerce; the treaty of 1854, between Japan and the United States; the treaty of 1854, between the United States and Russia, relative to the rights of neutrals on the sea; the treaty of commerce entered into in 1857, between France and Russia, &c. &c.

As regards treaties in which Great Britain is *directly* concerned, this collection is not, and it cannot be expected that it should be, nearly so complete as Mr. Hertslet's invaluable collection of treaties subsisting between Great Britain and foreign powers, but as it comprises treaties between *all* nations, it supplies much information which Mr. Hertslet's work does not afford, and may be consulted with advantage by those desirous of tracing the progress of other nations besides our own, and of learning something of the relations of foreign states amongst one another.

Amongst the publications notice whereof we must defer, are the following:—Mr. T. S. Paton's treatise on Stoppage *in transitu*; and a Manual of the Roman Civil Law, by George Leapingwell, Esq., LL.D., &c. Two pamphlets on Trial by Jury are also before us. The one entitled, "Unanimity on Trial by Jury Defended," is by Mr. G. Rochfort Clarke. The other entitled, "The Dark Side of Trial by Jury," is by Mr. Joseph Brown. The former supports the institution with undoubting and undoubted orthodoxy. The latter assaults it with unshrinking courage and vigour. We purpose to deal with these learned pleaders and experienced counsel according to law, on another occasion.

Events of the Quarter.

OUR Parliamentary "events of the quarter," regarded as to the amount of business done, and not the quantity of verbiage reported, will be very brief—The proceedings were inaugurated by flags waving and by the ministers' own trumpets blowing. But the unhealthy breath and wheezing bellows of faction have puffed, or are trying to puff out, the government rushlight. At all events, the flickering night-lamp of parliament has been extinguished, and much that threatened to be the most disastrous and sham legislation on important subjects, has for the present been dropped.

On March 29, a debate on the second reading of Lord Campbell's bill to regulate the verdicts given by juries on civil causes, took place in the House of Lords. The result is, that the legislature has refused for the present to alter the law as it now exists in England. With the arguments on both sides our readers are now familiar, and we need not here repeat them. No one, however, although his opinion may be strong in favour of abolishing forced unanimity, after reading Lord Lyndhurst's speech on the occasion referred to, can fail to recognise, in common candour, that "much may be said on both sides." The speech referred to is among other things interesting, as showing the vigour of the "old man eloquent," and the zest with which he still points his shafts and plants his blows.

Another debate in the House of Lords, on April 8, should be mentioned, in which also Lord Lyndhurst took a prominent part. It arose on the Lord Chancellor moving the third reading of the "Indictable offences (Metropolitan) bill"—the object of which is to enact that no criminal charge shall be preferred or tried in the central criminal court or sessions, within the metropolitan police district, unless such charge shall have been previously made and investigated before a justice of the peace. We will only offer one word of comment upon the debate raised on this question. Our ancestors and our successors seem to be, among other inconveniences, very great obstacles to practical legislation. A proved evil is put before the legislature. A remedy is suggested, whereupon the constitutional historian, with uplifted voice and deprecatory gesture, asks the Reformer—Did our *fathers* thus think? what was good for *them* must be suited to *us*; whilst the prophet of the future, on the other hand, bids us ponder on posterity, and what we owe to our children's children; "what has been useful," he sings, "though it be now injurious, may be again essential for unborn generations."

Now our fathers, when they did make good laws, made them, we believe, for their own use and behoof, and because they knew what

they wanted, and found a mode of supplying their own wants. They thought that succeeding generations could do the same. Alas! it is not so; for it is clear, from the wild debating of the present day, that on the most essential and important topics there is the greatest difference of opinion as to what we now want; and, if this is ever made clear to the majority, we have then to become antiquarian, and consider our forefathers' ways, and next whether our unborn children will not require the protection of the rules of our defunct progenitors.

The important matter relating to the title to real property and bankruptcy, which have formed the subject of parliamentary discussion, will be found discussed at length elsewhere in our pages this quarter.

Before our next number appears a new ministry will possibly be in office. Sir Richard Bethell may perhaps have to undertake some *genuine* conveyancing reforms. We shall then have three learned reformers at work on this and other important legal amendments. Those who have perused our Art. xiv. will see what *Sir Hugh* attempted. But *Sir Fitzroy* introduced (after a continuous parade of what he was about to do) at the last moment a batch of seven bills. With these things the names of the three knights-at-law will be remembered perhaps as, in 1808, were certain three knights-of-war.* Some of our older readers will recollect a jingle then commonly sung in the streets, and which we have heard thus parodied:—

"Sir Richard and Sir Fitzroy, Sir Fitzroy and Sir Hugh,
Cock-a-doodle, Cock-a-doodle, Cock-a-doodle-do.
Sir Richard is a lawyer, but as for the other two,
Cock-a-doodle, Cock-a-doodle, Cock-a-doodle-do."

Lord Brougham has again brought in his bill for extending his act of 1851 (Evidence of Parties) to criminal cases, at the option of the defendant. It was opposed by some of the law lords, upon this ground mainly, that whoever refused the benefit given, of electing to be examined, would be presumed to decline, because he was apprehensive of the effects of a cross-examination by the prosecutor. It is needless to observe that the case is very rare indeed, of a person not conscious of guilt, only shrinking from examination because deficient in acuteness, or courage, or presence of mind; and that the case is equally rare of a guilty person trusting to his courage and dexterity for defeating a cross-examination. The objection, therefore, really arises from a disposition to favour the escape of the guilty rather than provide for the safety of the innocent, to whom the fullest examination must always prove advantageous. A remarkable instance occurred the very day after this discussion, of the gross injustice which may be caused by the mouth of one party being closed while the other is fully heard. A petition was presented, setting forth that a clerk in a trading-house had been convicted and suffered six months' imprisonment for a fraud,

*Sir Arthur Wellesley, Sir Harry Burrard, and Sir Hew Dalrymple.

"Sir Arthur and Sir Harry, Sir Harry and Sir Hew,
Cock-a-doodle, &c.
Sir Arthur was a brave knight, but as for the other two,
Cock-a-doodle, &c. &c.

only proved by the testimony of a party in opposition to the firm ; and the petitioner's attorney, having acted in league with the prosecutor, had subsequently been convicted of fraud and forgery, while the attempt to proceed against the perjured witness failed, by his having fled after a fraudulent bankruptcy. This, no doubt, must be regarded as an extreme case, and one of rare occurrence ; but we have the high authority of Mr. Stuart Wortley, when recorder of London, who, though averse to Lord Brougham's Evidence of Parties' Bill in 1851, and giving the reasons why he could not support that great change in the law of procedure, stated that, if it was adopted, there might be an extension of it to criminal cases, as his own judicial experience had brought him acquainted with repeated cases, in which injustice would have been prevented by the examination of one party as well as the other.

Some of the learned judges are understood to consider that the measure should be adopted in all cases where the real prosecutor is called as a witness ; that to these cases the examination of the defendant should be confined, and that it should be excluded in all cases other than misdemeanour. In fact, cases of misdemeanour are almost the only ones in which the real prosecutor is examined, and this alteration may be made when the bill is re-introduced.

The subject is of great magnitude, but the arguments are within a very small compass. We feel, or affect, great repugnance to a party accused of a crime being examined even voluntarily ; but let him only be in misfortune, we allow him to be examined whether he will or no, and compel him to answer questions with the certainty that all he says, and also all his refusals to answer, may be given in evidence against him, on a charge it may be of felony, as well as misdemeanour. A bankrupt, or insolvent, must answer all questions put to him by his creditors, and his answers may not only cause his conviction in another court, but his punishment by the court where he is interrogated.

Nor is this the only inconsistency and caprice of our rules of procedure. Observe the distinction taken on this head, from the form of the proceeding, the substance being exactly the same. Under the new law of evidence, all parties may be examined, both voluntarily and compulsorily, on charges of the grossest frauds, the foulest conspiracy, the most outrageous violence, if the form of the proceeding is an action. Surely it is now too late to refuse extending the new act to prosecutors also, without which extension this important amendment of our law remains imperfect in a very essential respect.

Sir Joseph Arnould, as many of our readers will with us rejoice to know, has been appointed one of the puisne judges of the supreme court at Bombay. It is always dangerous to predict with certainty of any man that he will make a good judge, or we should prophesy it of Sir Joseph Arnould without hesitation. Mr. Arnould was well known in the profession as a learned and sound lawyer, rather than one over-

whelmed with junior business; and it speaks well for the discrimination of the authorities who have given him the appointment at Bombay, that they have known how to fix on a lawyer whose acquirements render him the right man for the preferment in question, though his name perhaps has not been among those most popular with attorneys, or very familiar to the readers of the newspaper *Nius Prius* reports.

The new judge has been living in a time of great legal reform in England, and has associated with those who have remodelled and renovated the procedure of our English courts. He knows therefore the principles of true reform in the matter. He will, it is to be hoped, bring his experience to bear on the new system to which he has removed. Mr. Arnould's work on marine insurance (a new edition of which we have recently seen) is an important contribution to legal literature, and affords an excellent example of a learned law-book in which scientific treatment and a practical object are alike observed. In America, where our really good law treatises are certain of being reprinted, "Arnould on Marine Insurance" has already passed through three editions.

Sir Joseph Arnould was entered at Charterhouse in 1828, and then proceeded to Oxford, and became a scholar of Wadham. He took his degree in 1836, and, achieving high honours in classics, became a fellow of his college in 1838. In 1841 he was called to the bar, having been a pupil of Sergeant Scriven and the present Mr. Justice Hill. He was a member of the Surrey sessions and the home circuit. And is an eminent example of a man who can combine the knowledge and practice of his profession with literary tastes and pursuits.

A disgusting and humiliating spectacle is being now exhibited in the city of London. A certain number of members of the bar are condescending to canvass, advertise, and puff themselves, for the purpose of procuring their election for the judgeship vacated by the death of Mr. Prendergast. Under such a system, and through such means, it is impossible for any barrister of standing or repute, or any gentleman having self-respect, to aspire to the office.

We trust the electors may have the good sense to reject all the pushing and canvassing candidates, and select, under proper advice, a really fit man for the office in question.

A commission has been appointed to report on the subject we lately discussed at length, that of providing in the metropolis proper courts of law on a suitable site. The commissioners are Sir J. T. Coleridge, Vice-chancellor Page Wood, Sir G. C. Lewis, Lord Wynford, Dr. Phillimore, and Mr. John Young.

Another commission (consisting of Sir John Awdry, the Earl of Devon, and Mr. Jebb) is appointed to report on the laws, civil and ecclesiastical, in Jersey—(*Vid ante*, Art. II.).

A return has just been made by the House of Lords, of the condition of business transacted and pending in the court of divorce: the arrears are frightful. It was known that the constitution of the court was inadequate for its functions, and the remedy was easy of invention and application, but the government was indifferent to the practical and indispensable reform, and has done nothing therein.

In the affairs of party, and indeed of states, we take no part whatever, except in so far as they affect the interests of jurisprudence; and, above all, of the progress of improvement in our laws. Hence, we have no concern with the extraordinary position in which this and other countries are now placed by the dissolution arising from the so called reform measure of the Conservative government, or the disastrous war policy pursued on the Continent. Men had not ceased to marvel at the Conservatives, the adversaries of reform, taking reform matter in hand, and raising, by the kind of measure propounded, a clamour upon the subject, which all the efforts of its most strenuous advocates had failed to excite by their uttermost efforts of agitation, when the French absolute government—the enemy of all popular movement—the denouncer even of moderate constitutional policy—proclaimed its adhesion to the cause of revolution in Italy. As was observed in jest—but the proverb says, that in jest many a true word is spoken—there seems so great a superabundance of liberty in France, that she can afford to export it. In the crisis which has arisen out of the false position both of the English and the French government, the interests of law amendment are so far concerned, that the cause of order at home and of peace abroad is the cause of legal improvement.

That the interests of law amendment are safe, whatever be the government established in this country, is to be hoped. We trust that no set of men, to whom the administration of our affairs can be intrusted, have it in their power to arrest the cause of improvement in our jurisprudence.

PRISON SYSTEMS.

WE perceive, in a philanthropic journal of the temperance promoters, a laboured panegyric on Sir R. Jebb, who is described as the greatest philanthropist, and the successor of Howard. Captain Crofton is said to be, so far as he follows his plans, good in his way; but a mere secondary person. The truth is precisely the reverse; and the journal in which this ridiculous statement has been inserted, through the intervention of some ill-judging friend of Sir R. Jebb's, ought to have known better from the authoritative statements at the Social Science Congress at Liverpool, and their published transactions—a well-meaning work like the *Meliora*, injures itself by impairing its authority when it suffers parties so to practise on it.

APPOINTMENTS, &c.

Sir Matthew Richard Sausse, late puisne judge of the Supreme Court of Bombay, has been promoted to the Chief-Justiceship of that Court, and Mr. (now Sir Joseph) Arnould of the Home Circuit, is appointed to the Puisne Judgeship vacated by such promotion.

Mr. A. F. Lutwyche has been appointed Attorney-General of New South Wales, in the room of Mr. J. Martin, retired.

Mr. W. F. Higgins, barrister-at-law, and son-in-law of the Lord Chancellor, one of the Registrars of the Court of Bankruptcy, was appointed to a Mastership in Lunacy, vacated by the retirement of Mr. Edward Winslow. Mr. Scott, private secretary to the Lord Chancellor, was appointed Registrar of the Court of Bankruptcy in the room of Mr. Higgins, and Mr. Charles Palmer Phillips of the Equity bar was appointed to the post vacated by Mr. Scott. In consequence, it is said, of some observations made in the House of Commons relative to the appointment of Mr. Higgins, and of the discontent of the political clubs attached to the interests of the Conservative government, and to those of their own office-wanting members, Mr. Higgins was led to tender his resignation, which was accepted, and Mr. Samuel Warren, Q.C., M.P., &c. &c. (upon the unpalatable condition of resigning his seat in parliament), was appointed to the Mastership in Lunacy. Mr. Higgins and Mr. Scott resumed their duties as Registrar and Private Secretary respectively, and Mr. Phillips retired altogether from office. The Chancellor of the Exchequer stated in the House, that the Lord Chancellor had informed him that Mr. Higgins would not have been appointed to the office in question, had not the noble and learned lord been thoroughly convinced of his competency to fulfil its duties. On a subsequent day, Mr. Samuel Warren gave the House to understand that the mastership had not been sought by him; but on account of *his* peculiar fitness for the office it had been offered to him spontaneously by the Lord Chancellor. It is evident, therefore, that Mr. Higgins and Mr. Samuel Warren are equally well-fitted for the post in question; and under these circumstances we must lament that Mr. Higgins should have been deprived of a valuable appointment, and that Mr. Samuel Warren's parliamentary talents should be lost to his party and the country.

Mr. G. H. Cary, of the Chancery Bar, and late pupil of the Solicitor-General, has been appointed Attorney-General of British Columbia.

Mr. Unthank, of the Northern Circuit, has been appointed Master of the Court of Queen's Bench, in the room of Mr. Bunce, deceased.

The Recordership of Norwich, vacant by the death of Mr. Prendergast, Q.C., has been conferred on Mr. O'Malley, Q.C.

Mr. Caillard, Conveyancer and Equity Draftsman, has been appointed Judge of the County Courts of Bath and North Wilts (Circuit No. 52), in the room of Mr. J. G. Smith, deceased.

Mr. W. H. Adams, M.P., Recorder of Derby, has been appointed Attorney-General at Hong-Kong.

SCOTLAND.

To Charles Baillie, Esq., Lord-Advocate, has been granted the place of one of the Lords of the Session, in the room of Lord Murray, deceased ; and David Mure, Esq., Solicitor-General for Scotland, has been appointed Lord-Advocate.

IRELAND.

Mr. John George has been appointed Solicitor-General ; Mr. W. C. Dobbs, Q.C., has been appointed a Judge of the Landed Estates Court ; and on Mr. A. Vauce, has been conferred the office of Law-Adviser of the Crown.

NECROLOGY.

February.

- 1st. PHILLIPS, Charles, Esq., one of the Commissioners of her Majesty's Court for Relief of Insolvent Debtors.
- 4th. BURTON, T. S., Esq., Solicitor.
- 5th. ANDERSON, R. H., Esq., Solicitor, aged 61.
- 5th. PATRICK, Charles, Esq., Solicitor.
- 9th. GRIFFITHS, William, Esq., Solicitor.
- 11th. RUSHWORTH, G. A., Esq., Solicitor, aged 55.
- 16th. DARNBOROUGH, Thomas, Esq., Solicitor, aged 67.
- 19th. HASTIE, James, Esq., Record Solicitor, aged 58.
- 21st. PRITCHARD, William, Esq., Proctor and Solicitor, aged 67.
- 22nd. BAKER, William, Esq., Coroner for the Eastern Division of the County of Middlesex, aged 77.
- 24th. CLARKSON, W. G., Esq., Proctor and Notary, aged 66.
- 24th. PRITCHARD, Edward, Esq., Solicitor, aged 59.
- 25th. SMEDLEY, Francis, Esq., High Bailiff of Westminster, aged 67.
- 26th. PILKINGTON, Henry, Esq., Barrister, aged 72.
- 27th. BRODERIP, William John, Esq., F.R.S., one of the Benchers of the Hon. Society of Gray's Inn, and formerly a Magistrate of the Westminster Police Court, aged 71.

March.

- 9th. Sir Anthony Oliphant, C.B., late Chief Justice in the Island of Ceylon, aged 65.
- 11th. DARVALL, Joseph, Esq., Solicitor, aged 69.
- 18th. GOOSE, John, Esq., Solicitor, aged 50.
- 19th. The Earl of Devon, aged 82. He was called to the Bar in 1799, and for a short time was a Master in Chancery, and subsequently Clerk-Assistant to the Parliaments, which office he held until he succeeded to the Peerage in 1835.
- 20th. PRENDERGAST, Michael, Esq., Q.C., Recorder of Norwich, and Judge of the Sheriff's Court, London.

- 23rd. M'DUFF, Charles, Esq., Solicitor, aged 59.
- 24th. Sir John Lewes Pedder, Knight, late Chief Justice of the Supreme Court, Van Diemen's Land.
- 26th. SMITH, J. G., Esq., Judge of the County Courts of Bath and North Wilts, aged 72.
- 26th. WRIGHT, J. E., Esq., Solicitor.
- 31st. WENTWORTH, W. C., jun., Esq., Barrister, aged 30.
- " DOBREE, J. S., Esq., one of the Jurats of the Royal Court of Guernsey.

April.

- 3rd. ROSCOE, Thomas, Esq., Solicitor
- 6th. POWELL, Samuel, Esq., Solicitor, aged 81.
- 8th. BOODLE, John, Esq., Conveyancer, aged 82.
- 12th. GRIFFIN, Nathaniel, Esq., aged 56.
- 13th. SANDERS, R. B., Esq., Solicitor, aged 60.

List of New Publications.

Archbold—The Consolidated and other Orders of the Poor-Law Commissioners and of the Poor-Law Board, with Introduction, Explanatory Notes, and Index. By J. F. Archbold, Esq., Barrister. The Statistical Portion by A. C. Banke, of the Poor-Law Board. 12mo, 9s. cloth.

Archbold's—Pleading and Evidence in Criminal Cases, with the Statutes precedent of Indictments, &c., and the Evidence necessary to support them. By J. Jervis, Esq., Barrister. Fourteenth edition, including the Practice in Criminal Proceedings generally. By W. N. Welsby, Esq., Barrister. Royal 12mo, 24s. cloth.

Bristowe—Private Bill Legislation; comprising the steps required to be taken by Promoters or Opponents of a Private Bill before and after its Presentation to Parliament, and the Standing Orders of both Houses; with Notes shewing their original subsequent Alterations to the Present Time. By S. B. Bristowe, Esq., Barrister. 12mo, 6s. cloth.

Cabinet Lawyer—A Popular Digest of the Laws of England, a Dictionary of Law Terms, Maxims, Statutes, and Judicial Antiquities, Tables of Assessed Taxes, Extra Licences, and Stamp Duties, &c. &c. Eighteenth Edition, extended and revised. 12mo, 10s. 6d. cloth.

Cox—The Law and Practice of Registration and Elections; comprising the Registration of Electors Act, the Reform Act, and the Recent Statutes, with the Decisions in Common Pleas on Appeals, to

the Present Time. Instructions for the Management of Elections in Counties, Cities, and Boroughs; and for the Management of Registrations, Instructions to Returning Officers, Forms, &c. By E. W. Cox, Esq., Barrister. Eighth Edition. 12mo, 12s. cloth.

Evans—Costs in Actions not value £20 in Contract, and not above £5 in Tort, in the Superior Courts: or how and when to obtain a Certificate, Rule, Order, or Suggestion for Costs: with Forms of Affidavits, &c. By J. Evans, Attorney. 12mo, 4s. cloth.

Glen—The Consolidated and other Orders of the Poor-Law Commissioners and the Poor-Law Board, together with the General Orders relating to Poor-Law Accounts; the Statutes relating to the Orders, Audit of Accounts, Appeals, and the payment of Parish Debts: with Explanatory Notes, elucidating the Orders and the Decisions thereon: Tables of Statutes, Cases, and Index. By W. C. Glen, Esq., Barrister. Fourth Edition. 12mo, 12s. cloth.

Hudson—Plain Directions for making Wills, in conformity with the Law, and particularly with reference to Recent Acts. By J. C. Hudson, of the Legacy Duty Office. A New Edition. 12mo, 2s. 6d. cloth.

Lees—The Laws of the Customs, with the Tariff or Customs Table, and Customs Forms; and an Appendix, containing the Acts, and Rules, and Orders of the Commissioners. By J. Lees. Post 8vo, 5s. cloth.

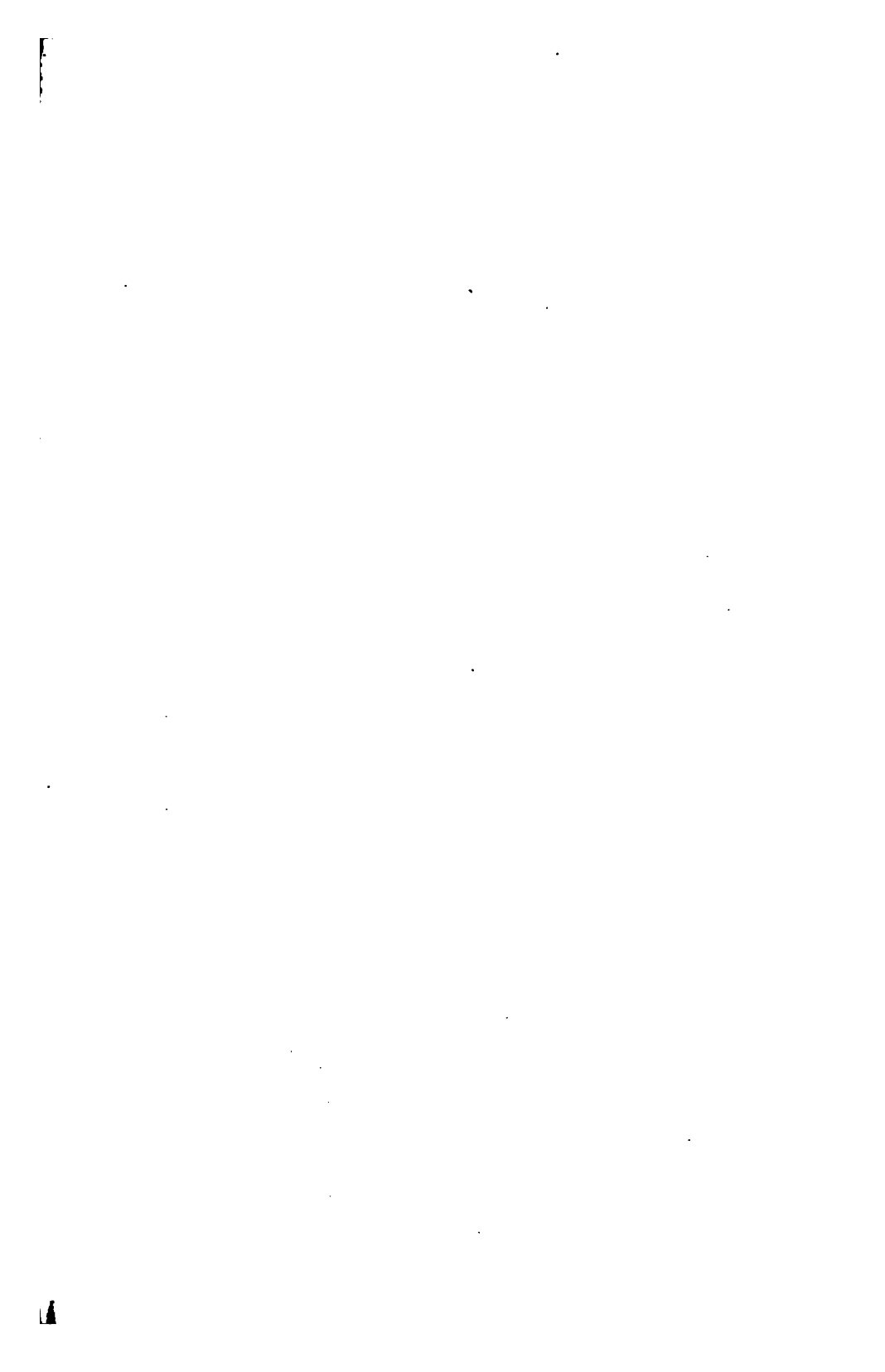
Lewis—The Election Manual for England and Wales; being a plain and practical Key to the existing Laws affecting Elections and Election Matters; with the Text of the principal Matters, Notes, Forms, and Precedents. By C. E. Lewis, Solicitor. 12mo, 5s. boards.

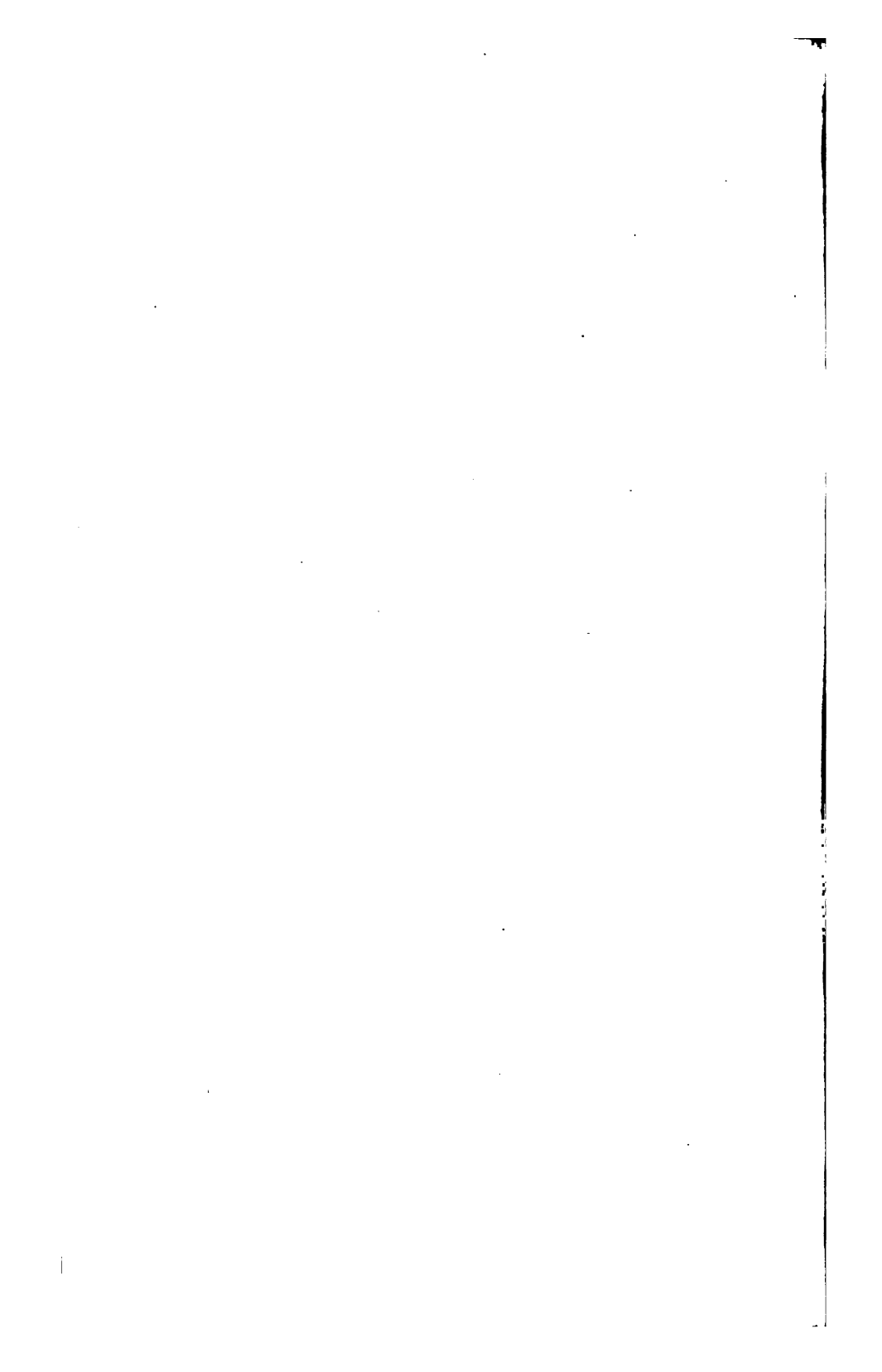
Pritchard—A Hand-Book on the Law of Marriage and Divorce, containing a Digest of all the Acts of Parliament relating thereto; including the New Divorce Acts and Legitimacy Declaration Act, of Proceedings in the House of Lords on Private Divorce Bills, and of the Reprinted Cases, together with Precedents and Bills of Costs. By R. A. Pritchard, Esq., Barrister, and W. T. Pritchard, Proctor. Royal 8vo, 15s. cloth.

Rogers—Law and Practice of Elections, Election Committees, and Registrations; with an Appendix of Statutes and Forms. By F. N. Rogers, and F. J. P. Wolferstan, Esqs., Barristers. Ninth Edition. 12mo, 30s. cloth.

Sharkey—A Hand-Book of the Law and Practice of Election Committees, with a full Selection of Statutes, Cases, and Precedents. By J. B. Sharkey, Parliamentary Agent. 12mo, 5s. boards.

Williams—Principles of the Law of Real Property, intended as a First Book for the use of Students in Conveyancing. By J. Williams, Esq., Barrister. Fifth Edition. 8vo, 18s. cloth.





THE
Law Magazine and Law Review:
OR,
QUARTERLY JOURNAL OF JURISPRUDENCE.

No. XIV.

ART. I.—SIR JOHN TAYLOR COLERIDGE AND
MR. BUCKLE.

1. *On Liberty*. By JOHN STUART MILL. London: J. W. Parker & Son, West Strand, 1859.
2. *Fraser's Magazine*, for May and June, 1859.
3. *A Letter to a Gentleman respecting Pooley's Case*. By HENRY THOMAS BUCKLE. London: J. W. Parker & Son, 1859.

MR. MILL, in his recent admirable treatise on "Liberty," has the following passage—"Penalties for opinion, or at least for its expression, still exist by law; and their enforcement is not, even in these times, so unexampled as to make it at all incredible that they may some day be revived in full force. In the year 1857, at the summer assizes of the county of Cornwall, an unfortunate man [Thomas Pooley], said to be of unexceptionable conduct in all relations of life, was sentenced to twenty-one months' imprisonment, for uttering, and writing on a gate, some offensive words concerning Christianity."

In reviewing Mr. Mill's book, in the May number of *Fraser's*
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Magazine, Mr. Buckle has taken the above paper as his text, and composed thereon certain remarks, written with his wonted power and ability.

Mr. Buckle writes as follows—

“Inasmuch, therefore, as, in the present state of English society, any punishment inflicted for the use of language which did not tend to break the public peace, and which was neither seditious in reference to the state, nor libellous in reference to individuals, would be simply a wanton cruelty, alien to the genius of our time, and capable of producing no effect beyond reviving intolerance, exasperating the friends of liberty, and bringing the administration of justice into disrepute, it was with the greatest astonishment that I read in Mr. Mill’s work that such a thing had occurred in this country, and at one of our assizes, less than two years ago. Notwithstanding my knowledge of Mr. Mill’s accuracy, I thought that, in this instance, he must have been mistaken. I supposed that he had not heard all the circumstances, and that the person punished had been guilty of some other offence. I could not believe that, in the year 1857, there was a judge on the English bench who would sentence a poor man of irreproachable character, of industrious habits, and supporting his family by the sweat of his brow, to twenty-one months’ imprisonment, merely because he had uttered and written on a gate a few words respecting Christianity. Even now, when I have carefully investigated the facts to which Mr. Mill only alludes, and have the documents before me, I can hardly bring myself to realize the events which have actually occurred, and which I will relate, in order that public opinion may take cognizance of a transaction which happened in a remote part of the kingdom, but which the general welfare requires to be bruited abroad, so that men may determine whether or not such things shall be allowed.

“In the summer of 1857, a poor man, named Thomas Pooley, was gaining his livelihood as a common labourer in Liskeard, in Cornwall, where he had been well known for several years, and had always borne a high character for honesty, industry, and sobriety. His habits were so eccentric that his mind was justly reputed to be disordered; and an accident, which happened to him about two years before this period, had evidently inflicted some serious injury, as since then his demeanour had become more strange and excitable. Still, he was not only perfectly harmless, but was a very useful member of society, respected by his neighbours, and loved by his family, for whom he toiled with a zeal rare in his class, or indeed in any class. Among other hallucinations, he believed that the earth was a living animal,

and, in his ordinary employment of well-sinking, he avoided digging too deeply, lest he should penetrate the skin of the earth, and wound some vital part. He also imagined that if he hurt the earth the tides would cease to flow; and that nothing being really mortal, whenever a child died it reappeared at the next birth in the same family. Holding all nature to be animated, he moreover fancied that this was in some way connected with the potato-rot, and, in the wildness of his vagaries, he did not hesitate to say, that if the ashes of burnt Bibles were strewed over the fields, the rot would cease. This was associated in his mind with a foolish dislike of the Bible itself, and an hostility against Christianity; in reference, however, to which he could hurt no one, as not only was he very ignorant, but his neighbours, regarding him as crackbrained, were uninfluenced by him; though in the other relations of life he was valued and respected by his employers, and indeed by all who were most acquainted with his disposition.

"This singular man, who was known by the additional peculiarity of wearing a long beard, wrote upon a gate a few very silly words expressive of his opinion respecting the potato-rot and the Bible, and also of his hatred of Christianity. For this, as well as for using language equally absurd, but which no one was obliged to listen to, and which certainly could influence no one, a clergyman in the neighbourhood lodged an information against him, and caused him to be summoned before a magistrate, who was likewise a clergyman. The magistrate, instead of pitying him or remonstrating with him, committed him for trial, and sent him to jail. At the next assizes he was brought before the judge. He had no counsel to defend him, but the son of the judge acted as counsel to prosecute him. The father and the son performed their parts with zeal, and were perfectly successful. Under their auspices, Pooley was found guilty. He was brought up for judgment. When addressed by the judge, his restless manner, his wild and incoherent speech, his disordered countenance and glaring eye, betokened too surely the disease of his mind. But neither this, nor the fact that he was ignorant, poor, and friendless, produced any effect upon that stony-hearted man who now held him in his gripe. He was sentenced to be imprisoned for a year and nine months. The interests of religion were vindicated. Christianity was protected, and her triumph assured, by dragging a poor, harmless, and demented creature from the bosom of his family, throwing him into jail, and leaving his wife and children without provision, either to starve or to beg.

"Before he had been many days in prison, the insanity which was obvious at the time of his trial ceased to lurk, and broke

out into acts of violence. He grew worse; and, within a fortnight after the sentence had been pronounced, he went mad, and it was found necessary to remove him from the jail to the County Lunatic Asylum. While he was lying there, his misfortunes attracted the attention of a few high-minded and benevolent men, who exerted themselves to procure his pardon; so that, if he recovered, he might be restored to his family. This petition was refused. It was necessary to support the judge; and the petitioners were informed that, if the miserable lunatic should regain his reason, he would be sent back to prison to undergo the rest of his sentence. This, in all probability, would have caused a relapse; but little was thought of that; and it was hoped that, as he was an obscure and humble man, the efforts made in his behalf would soon subside. Those, however, who had once interested themselves in such a case, were not likely to slacken their zeal. The cry grew hotter, and preparations were made for bringing the whole question before the country. Then it was that the authorities gave way. Happily for mankind, one vice is often balanced by another, and cruelty is corrected by cowardice. The authors and abettors of this prodigious iniquity trembled at the risk they would run if the public feeling of this great country were roused. The result was, that the proceedings of the judge were rescinded as far as possible, by a pardon being granted to Pooley, less than five months after the sentence was pronounced. By this means, general exposure was avoided; and perhaps that handful of noble-minded men who obtained the liberation of Pooley, were right in letting the matter fall into oblivion after they had carried their point. Most of them were engaged in political or other practical affairs, and they were, therefore, obliged to consider expediency as well as justice. But such is not the case with the historian of this sad event. No writer on important subjects has reason to expect that he can work real good, or that his words shall live, if he allows himself to be so trammelled by expediency as to postpone to it considerations of right, of justice, and of truth. A great crime has been committed, and the names of the criminals ought to be known. They should be in every one's mouth. They should be blazoned abroad, in order that the world may see that in a free country such things cannot be done with impunity. To discourage a repetition of the offence the offenders must be punished. And surely no punishment can be more severe than to preserve their names. Against them personally I have nothing to object, for I have no knowledge of them. Individually, I can feel no animosity towards men who have done me no harm, and whom I have never seen. But they have violated principles dearer to me than any personal feeling,

and in vindication of which I would set all personal feeling at nought. Fortunate, indeed, it is for humanity that our minds are constructed after such a fashion as to make it impossible for us, by any effort of abstract reasoning, to consider oppression apart from the oppressor. We may abhor a speculative principle, and yet respect him who advocates it. This distinction between the opinion and the person is, however, confined to the intellectual world, and does not extend to the practical. Such a separation cannot exist in regard to actual deeds of cruelty. In such cases our passions instruct our understanding. The same cause which excites our sympathy for the oppressed, stirs up our hatred of the oppressor. This is an instinct of our nature, and he who struggles against it does so to his own detriment. It belongs to the higher region of the mind; it is not to be impeached by argument; it cannot even be touched by it. Therefore it is, that when we hear that a poor, a defenceless, and a half-witted man, who had hurt no one—a kind father, an affectionate husband, whose private character was unblemished, and whose integrity was beyond dispute—is suddenly thrown into prison, his family left to subsist on the precarious charity of strangers, he himself by this cruel treatment deprived of the little reason he possessed, then turned into a madhouse, and finally refused such scanty redress as might have been afforded him, a spirit of vehement indignation is excited, partly, indeed, against a system under which such things can be done; but still more against those who, in the pride of their power and wickedness of their hearts, put laws into execution which had long fallen into disuse, and which they were not bound to enforce, but of which they availed themselves to crush the victim they held in their grasp.

“The prosecutor who lodged the information against Pooley, and had him brought before the magistrate, was the Rev. Paul Bush. The magistrate who received the information, and committed him for trial, was the Rev. James Glencross. The judge who passed the sentence which destroyed his reason and beggared his family, was Mr. Justice Coleridge.

“Of the two first little need be said. It is to be hoped that their names will live, and that they will enjoy that sort of fame which they have amply earned. Perhaps, after all, we should rather blame the state of society which concedes power to such men, than wonder that having the power they should abuse it.

“But with Mr. Justice Coleridge we have a different account to settle, and to him other language must be applied. That our judges should have great authority is unavoidable. To them a wide and discretionary latitude is necessarily intrusted. Great confidence being reposed in them, they are bound by every pos-

sible principle which can actuate an honest man, to respect that confidence. They are bound to avoid not only injustice, but, so far as they can, the very appearance of injustice. Seeing, as they do, all classes of society, they are well aware that among the lower ranks there is a deep, though on the whole a diminishing, belief that the poor are ill-treated by the rich, and that even in the courts of law equal measure is not always meted out to both. An opinion of this sort is full of danger, and it is the more dangerous because it is not unfounded. The country magistrates are too often unfair in their decisions, and this will always be the case until greater publicity is given to their proceedings. But from our superior judges we expect another sort of conduct. We expect, and it must honestly be said we usually find, that they shall be above petty prejudices, or, at all events, that whatever private opinions they may have, they shall not intrude those opinions into the sanctuary of justice. Above all do we expect, that *they shall not ferret out* some obsolete law *for the purpose* of oppressing the poor, when they know right well that the anti-christian sentiments which that law was intended to punish, are quite as common among the upper classes as among the lower, and are participated in by many persons who enjoy the confidence of the country, and to whom the highest offices are intrusted.

"That this is the case was known in the year 1857 to Mr. Justice Coleridge, just as it was then known, and is now known, to every one who mixes in the world. The charge, therefore, *which I bring against this unjust and unrighteous judge is, that he passed a sentence of extreme severity upon a poor and friendless man, in a remote part of the kingdom, where he might reasonably expect that his sentence would escape public animadversion; that he did this by virtue of a law which had fallen into disuse, and was contrary to the spirit of the age; or rather, by virtue of the cruel and persecuting maxims of our old Common Law, established at a period when it was a matter of religion to burn heretics and to drown witches. Why did not such a judge live three hundred years ago? He has fallen upon evil times, and has come too late into the world, and that he would not have dared to commit such an act in the face of a London audience, and in the full light of the London press. Neither would he, nor those who supported him, have treated in such a manner a person belonging to the upper classes. No. They select the most inaccessible county in England, where the press is least active and the people are most illiterate, and there they pounce upon a defenceless man and make him the scapegoat. He is to be the victim whose vicarious sufferings may atone for the offence of more powerful unbelievers. Hardly a year goes by without some writer of influence and ability attacking*

Christianity, and every such attack is punishable by law. *Why did not Mr. Justice Coleridge*, and those who think like him, *put the law into force* against those writers? Why do they not do it now? Why do they not have the learned and the eminent indicted and thrown into prison? Simply because they dare not. I defy them to it. They are afraid of the odium; they tremble at the hostility they would incur, and at the scorn which would be heaped upon them, both by their contemporaries and by posterity. Happily for mankind, literature is a real power, and tyranny quakes at it. But to me it appears that men of letters perform the least part of their duty when they defend each other. It is their proper function, and it ought to be their glory, to defend the weak against the strong, and to uphold the poor against the rich. This should be their pride and their honour. I would it were known in every cottage that the intellectual classes sympathize, not with the upper ranks but with the lower. I would that we made the freedom of the people our first consideration. Then, indeed, would literature be the religion of liberty, and we, priests of the altar, ministering her sacred rites, might feel that we act in the purest spirit of our creed when we denounce tyranny in high places, when we chastise the insolence of office, and when we vindicate the cause of Thomas Pooley against Justice Coleridge.

"For my part, I can honestly say that I have nothing exaggerated, nor set down aught in malice. What the verdict of public opinion may be, I cannot tell. I speak merely as a man of letters, and do not pretend to represent any class. I have no interest to advocate; I hold no brief; I carry no man's proxy. But unless I altogether mistake the general feeling, it will be considered that a great crime has been committed; that a knowledge of that crime has been too long hidden in a corner; and that I have done something towards *dragging the criminal from his covert*, and letting in on him the full light of day.

"This gross iniquity is, no doubt, to be immediately ascribed to *the cold heart and shallow understanding of the judge* by whom it was perpetrated. If, however, public opinion had been sufficiently enlightened, those evil qualities would have been restrained, and rendered unable to work the mischief. Therefore it is, that the safest and most permanent remedy would be to diffuse sound notions respecting the liberty of speech and of publication. It should be clearly understood that every man has an absolute and irrefragable right to treat any doctrine as he thinks proper; either to argue against it, or to ridicule it. If his arguments are wrong, he can be refuted; if his ridicule is foolish, he can be out-ridiculed. To this, there can be no exception. It matters not what the tenet may be, nor how dear it is to our feelings."

Such is Mr. Buckle's statement of Pooley's case, and such his commentary thereon. Although we confess it is uncongenial to our feelings to be obliged to repeat some of the above paragraphs in our pages, this course has, under the circumstances, become necessary, especially since their author has also published, in some further remarks, his own account of what the above extracts signify; and this latter explanation differs materially from the meaning which we attached to them.

"What the verdict of public opinion may be, I cannot tell," says Mr. Buckle. Although we do not pretend to record such verdicts (having, nevertheless, a strong opinion what must be the judgment of all who are able to arrive at one on this subject), we *are* able to say what is the sentiment throughout the legal profession. It is one of indignation, not unmingled with shame. Of *indignation* that a judge, among the eminent men who were his contemporaries on the bench pre-eminent for his great learning, sterling ability, and judicial virtues, should be thus attacked in an unjustifiable libel; of *shame* that a man, venerable and venerated, possessed in a remarkable degree of a pure love of justice, distinguished for courtesy and kindness in all the relations of life, public and private; and who, having retired from the bench, best beloved, esteemed, and honoured by those who best knew him, and knew how to value what is amiable, estimable, and honourable—that such a man as Sir John Coleridge should have been subjected to slander so virulent, mistaken, and foolish, as that into which Mr. Buckle has unfortunately been betrayed.

According to our experience, so far from there being a disposition to laud Mr. Buckle's efforts, either on the part of the public or of the legal profession, there is a general concurrence in opinion that the critic, in writing and printing his scandalous charges against Sir John Coleridge, has evinced insufficient appreciation of the facts connected with Pooley's trial, and total misapprehension of the principles and practice of criminal law. In fact, Mr. Buckle has put himself in a false position. But, from his peculiar constitution of mind, we quite believe that he

does not now, nor will he be ever able himself to perceive that this is so.

Although Mr. Buckle, we find, did not ask the question—one very pertinent to the subject, however—as to who Sir John Coleridge is, yet *we* may perhaps be allowed to make this inquiry. Who, then, is this man “of cold heart and shallow understanding,” who, acting together with a certain wretched and intolerant faction with which he was connected, selects the most inaccessible county in England,* where the press is least active, and the people most illiterate, and then “pounce upon a defenceless man, and make him the scapegoat” for the offences of more powerful unbelievers, who are too strong to be attacked? What has been the history and life of this “unjust and unrighteous judge,” this iniquitous person, who, with his son as prosecuting counsel, was cruel and cowardly enough to crush an unfortunate victim, in order that malignant prejudices might be gratified, and the spleen of a miserable clique of intolerant religionists be humoured? Who is this functionary, who abuses a high and sacred office for his own mean, revengeful, and cowardly purposes? We do think that Mr. Buckle might have made some inquiries himself on the subject, as obviously character forms an element in calculating the probable motives of a man acting in a transaction such as Mr. Buckle has described. Had he done so, he would then perhaps have learnt that Sir John Coleridge was distinguished at his university as an accomplished scholar—that he was then the intimate friend of a body of earnest, zealous, and highly-gifted contemporaries—no insignificant men in later life—that his society was courted, his correspondence cherished, and his opinions valued by some of the leading and most thoughtful men of the age—that, in his professional career at the bar, he obtained the success which terminated in his promotion to the

* Mr. Buckle has repudiated the notion that he here meant, that the judge exercised any choice as to where the case should be tried, or had any knowledge that such a case as Pooley's was to be tried previous to the trial. If Mr. Buckle has been misunderstood, it is his own fault for writing loosely and wildly on two important topics—human liberty and personal character.

bench, by the legitimate exercise of his talents, his distinguished fame as a lawyer, and his high and unblemished reputation.

We, who for years have been wont to watch Mr. Justice Coleridge on the bench, feel ashamed in referring to what must be more or less within the knowledge of the whole profession—his lofty character, strong undeviating sense of rectitude, and zeal for constitutional rights of all on whose interests he had to decide. We know that the occupants of the English bench are, and indeed have been for years, marked by high judicial qualities; but amongst our judges Mr. Justice Coleridge was conspicuous for his possession of the brightest and most admirable of these virtues. His love of Justice seemed an instinct—his search after the very truth a necessary and essential condition of his mind. His overwhelming sense of personal duty, and his absence of all “fear or favour” (which sometimes, according to Bacon, beset judges), were proverbial. Whilst he listened with the moderation and modesty which belong to real knowledge and true wisdom, to the arguments of counsel and the opinions of his brethren on the bench, he delivered his own judgments with perfect independence and resolution, which is not their least merit.¹

Mr. Buckle might also, with a very little inquiry of those from whom he could easily have received authentic information, have ascertained that the private life and personal virtues of the man whom he has thought proper to accuse of crimes against society and outrages upon humanity, are such as would shed a lustre upon any name, and render it impossible for him to have committed an abominable act from a wicked motive. Nor can it be contended in excuse that the criticism was legitimately applied to a public officer, not to the *man*. A “most unjust, unrighteous judge,” “a stony-hearted man,” tyrannical and insolent in office, who “ferrets out obsolete laws” to gratify his malignity,

¹ In our last Number reference was made to one of the excellent judgments of Coleridge, J., in which he vindicates the “liberty” of the subject with remarkable eloquence and force, see No. XIII., p. 17.

and committed the "great crime" which has compelled Mr. Buckle to blazon forth his name with that of the other criminals concerned; he who, with others in the pride of power and wickedness of heart, availed himself of laws which "he was not bound to enforce"—who intrudes his petty prejudice into the sanctuary of justice is not only an iniquitous judge—he is an odious man. It would be worse than puerility to say that the attack made on Mr. Justice Coleridge, in *Fraser's Magazine* for May, is not directed personally against the man, his character, and general reputation. Mr. Buckle is too great a master of language not to know that he has drawn a powerful picture of a malevolent, bigoted, old judicial savage, and, whether meant or not, of a son equally prejudiced and unfair, both of whom delight in torturing innocent misbelievers in a cowardly and clandestine fashion.

Mr. J. D. Coleridge has replied in the June number of *Fraser's Magazine* to Mr. Buckle's essay, and animadverted on the offensive accusations contained therein, whether clearly expressed or necessarily implied, and Mr. Buckle has rejoined in a short pamphlet. The latter gentleman, as we now understand him, says, that in the passages which we have quoted, and on which, necessarily, Mr. Coleridge has commented, he did not mean to say that there was a combination between the various bigots who were party to the persecution—judge, magistrates, &c. If so, we must observe Mr. Buckle has been singularly unhappy in his language. We have given *in extenso* certain of the passages, the signification of which are now questioned, and the reader must judge for himself. But they will not overlook such phrases as the following:—"Neither would he (Mr. J. Coleridge), *nor those who supported him*, have treated in such a manner a person in the upper classes. No. *They* select the most inaccessible county, &c., and there they pounce upon a defenceless man," &c. And, indeed, the writer clubs together "Mr. Justice Coleridge and those who think like him," throughout, as persons united for a common and wicked purpose of persecution. We really do not understand how, according to the ordinary acceptance of the

language employed, any person in common candour could easily interpret its meaning in a different mode to that adopted by Mr. Coleridge. He, indeed, properly distinguishes between what Mr. Buckle positively affirms, and what he leads one to infer; but we do think that Mr. Coleridge is wrong in accusing Mr. Buckle of lacking courage in framing his indictment. There is nothing cowardly or roundabout in his language, to our apprehension. We had no doubts as to Mr. Buckle's meaning; nor do we believe that our readers could have any doubt as to what Mr. Buckle has said, until they happened to peruse his rejoinder to Mr. Coleridge. Thus, again, we read in Mr. Buckle's essay, "Pooley had no counsel to defend him, but the son of the judge acted as counsel to prosecute him. The father and the son performed their parts with zeal, and were perfectly successful. Under their auspices, Pooley was found guilty." Now, we certainly did, and do think, that this passage contains an inferential charge (and none the less offensive because indirect) against the two persons there named—Sir John Coleridge and his son. When the writer says *they were perfectly successful*, having first pointedly alluded to the family connection between the judge and counsel, any impartial reader would conclude that *they* had a common object, which they achieved, and be led to suspect *they* acted in concert. Mr. Buckle now declares that he did not intend to suggest that, in the slightest degree, any "private understanding" existed between the judge and the counsel. Here Mr. Buckle again has been very infelicitous in his expressions. What would he say if he read one morning a passage in the papers to this effect?—"Sir John Coleridge was notoriously in such a position that he could not defend himself against dishonourable charges urged in the pages of a periodical; but Mr. Henry Thomas Buckle acted as the man who should pen a libel against him, and Mr. J. W. Parker, who owned a magazine of considerable circulation, was to be the publisher. The writer and the publisher *performed their parts with zeal, and were perfectly successful*. Under their auspices, Mr. Justice Coleridge was grossly libelled." Mr. Parker would not be satisfied if, on

complaining of this way of making the statement, he were answered after Mr. Buckle's fashion¹—"Every word of this is literally and strictly true. Mr. Buckle *did* write the libellous essay; he and Mr. Parker *did* perform their parts with zeal, and successfully; and Sir John Coleridge was libelled in consequence of the writing and publishing the essay in *Fraser*." It seems to us strange that Mr. Buckle professes not to see the effect of the statement we are referring to, and the necessary innuendo it contains, and still stranger that he should defend himself by saying—"It is the simple and literal truth." Such literal truths mislead the reader. When, for example, a person declared that he knew "there had been, some time since, a secret connection between a certain gentleman and a pickpocket," and being called on for an explanation, replied that it was "literally true;" for he had once seen the thief with his hand in the gentleman's pocket, *his literalness* was held to be more ingenious than candid.

Mr. Coleridge, in our opinion, could not pass over the improper passage in question, and his interpretation of it is not unnatural, while Mr. Buckle's explanation is unsatisfactory. But as Mr. Buckle seems now to indicate that he did not, and does not, impute to this gentleman (as ordinary readers might have presumed) immoral and unprofessional conduct, this branch of his "rhetorical indictment" is withdrawn. It is not now a reckless charge made, but reckless language indulged in, against which we have to protest. But the legal profession is so extensive, and its division so various, that some may well hear of the rumour of an offensive charge made against Mr. Coleridge, who have no means of knowing what manner of man Mr. Coleridge is. For this reason chiefly, we feel bound to take the unusual course of referring personally to the professional character and reputation of the gentleman believed to have been thus assailed. There are men doubtless at the bar, who in pushing themselves risk character and bring discredit on the profession. There are those who resolve, *per fas et*

¹ P. 7 of his "Letter to a Gentleman," &c.

nefas, to achieve success, and stick at nothing which interferes therewith. With these honour is only a useful phrase, and etiquette a system much prized, inasmuch as it shackles scrupulous men whilst it leaves themselves free. There may be men, moreover, who will truckle to a judge, deceive the court, and take any unfair advantage of any person, be he judge, opponent, client, or even a helpless prisoner in the dock.

Every profession and trade may have some members adhering to it, who are dirty, dishonourable, underhand, and self-seeking, and who would never forego a personal profit if it merely clashed with a professional or moral duty. Such an one might Mr. Coleridge probably be, if he had been guilty of the conduct which it appears was not imputed to him; but such an one he is *not*. It would have been difficult for a son of Mr. Justice Coleridge to forget the first principles of professional duty in a foolish attempt to carry out a personal predilection for persecution. It would have been strange, indeed, if he were not as honourable and high-minded as he is an able and rising lawyer.

If we were to speculate upon how it came to pass, that Mr. Buckle came thus unnecessarily to introduce the name of the son of Sir John Coleridge into the discussion, we should undoubtedly suggest that it arose from precipitately following the example (as he does in some instances closely) of Mr. Holyoake, who in his pamphlet has been guilty of the vulgar folly of an allusion to "the Coleridges," as "one to prosecute and the other to sentence." This is a curious coincidence, unless indeed it is simply the simple repetition by one writer of the idea of the other. It would be still more remarkable, however, if Mr. Holyoake were to defend himself by saying—"But the two Coleridges *were* there, and one *did* prosecute, and the other *did* sentence."

We have said thus much upon the *personal* part of the question which Mr. Buckle has made so prominent; we will now refer to certain facts not presented by Mr. Buckle in the passages we have cited; but which will be found in the letter by

Mr. J. D. Coleridge to the editor of *Fraser's Magazine* for June, and in an account of Pooley's case by Mr. Holyoake.

And first, if the publication of words, offensive and horrible to the ears and eyes of the community, ought ever to be made cognizable by the criminal law (as to which we now say nothing), then (supposing Pooley to have been sane) the prosecution in question at Bodmin was certainly justifiable.

2ndly, We have Mr. Coleridge's statement, that no suggestion was made to him as counsel for the prosecution, and no notion, either by the judge or himself, was entertained of the deranged mental condition of the prisoner being such as we have no doubt it then was, and had been for years.

3rdly, That Sir John Coleridge recommended Pooley for pardon so soon as he discovered there was true ground to believe that Pooley was diseased in his brain. The letter of the judge to the Home Secretary ought to be read by those who have perused Mr. Buckle's personal attacks. It is as follows:—

“26, *Park Crescent*, Dec. 2, 1857.

“SIR—Thomas Pooley was convicted before me on three charges of blasphemy of a very offensive character. There was not the slightest suggestion made to me of his being other than perfectly sane, nor was there any thing in his demeanour at the trial, or in the conduct of his defence by himself, which indicated it; nor did I collect it from the manner in which he, as it seemed, habitually committed the offence. But I see no reason whatever why he should not receive a free pardon under the circumstances stated in your letter. Had I been informed of any thing which had led me to inquire into his sanity during the trial, it is probable I might have discovered enough to have led to an acquittal on the ground of insanity, which on such a charge I should have been very glad to have arrived at.—I have the honour to remain, sir, your obedient servant,

“JOHN T. COLERIDGE.

“Horace Waddington, Esq.”

This letter is a sufficient assurance to us that Sir John Coleridge, at least, was not anxious for the continued imprisonment of Pooley to gratify his Christian spleen.

But in point of fact Pooley was insane—notoriously so for fifteen years before the trial—obviously so on the trial itself—proved to be so when in jail—so admitted when in the lunatic asylum. Further, the judge himself acquiesced in his being so considered when the facts were laid before him. We do not for one moment doubt Mr. Coleridge's statement, that neither he nor the judge were cognizant of the fact on the trial, and we should be ashamed of insinuating that it was bigotry which blinded them to the fact. But it appears to us that they to whom the fact was known, ought not (especially as the man was poor and undefended) to have shut out the information from the counsel or the court. The counsel may well have thought that, if there was any ground for this opinion, the prosecutors would surely have been honest enough to insert it in the brief. And the judge would assume that every thing connected with the prosecution being so "respectable," the criminal law would not have been set in operation unfairly. The impropriety of the prosecution on the ground of the obvious mental alienation of the prisoner was, we may observe, pointed out immediately by the press. The *Spectator* newspaper (Aug. 8, 1857) especially, with its usual accuracy and acuteness, drew the attention of the public to the trial, and passed very apposite strictures thereon. It was too striking a fact to escape disinterested observation. The habit of incontinently scribbling up every where phrases referring to the delusion from which the patient is suffering, is a well-known and common phase of mania. The absurd and incoherent character of the language employed by Pooley—his remarkable appearance and gestures—would all have contributed to confirm the impression of his being mad, if the idea had been once suggested. And we do not hesitate to say, that there must have been evidence abundant to shew those who instituted the proceedings, that Pooley was not a proper subject of prosecution. Mr. Coleridge, in his reply to Mr. Buckle, cites Mr. Grylls (the attorney for the prosecution), and the clerk to the magistrates. The result of reading what Mr. Grylls has communicated to Mr. Coleridge, has, we regret to

say, convinced us that this attorney does not or will not understand the mischief to which he has been party. He assures us that Pooley is "perfectly rational on all points *but religion*," and adds, as a *sequitur* we presume, "the attempt to shew he is insane is *absurd*." This is either absolute stupidity on Mr. Grylls' part, or, having conducted the prosecution, and being, with the aid of the reverend gentlemen, the moving cause of the unfortunate trial and its consequences, he obdurately sticks to what would appear to any candid mind utterly untenable. Mr. Grylls knows, it would seem, Pooley's earlier history—he knows, moreover, that the poor man was transferred from prison to the lunatic asylum. He might (and possibly does) know what Pooley's mental condition was in both places; and he knows that Pooley was proved to be insane to the satisfaction of the Home Office; yet this ingenuous attorney for the prosecution cannot persuade himself that it was not a very just and proper prosecution, and that it has not done Pooley a great deal of good. Mr. Coleridge has been frank enough to publish (though it would have been better omitted, if he had wished to defend at all hazards the whole proceedings) what Mr. Grylls has said on the subject; but there is something about this person's communication which, we confess, seems to arise from a desire to justify conduct, of which we assure him he need not be, either on his or on his client's account, at all proud.

"The case of Thomas Pooley," by G. J. Holyoake, although vulgar in tone, and in his comments evincing prejudice and bitterness in the writer, still relates certain circumstances in the history of Pooley and his case which are interesting, and indeed very touching, and the general accuracy of which we see no reason to suspect. Mr. Buckle has obviously either drawn his information from the pamphlet and Mr. Holyoake, or they have had common sources of intelligence. Mr. Holyoake, however, went down to the spot, and has given certain details of what he saw and heard, which throw some light on the transactions we have been referring to, and which must have been notorious in the neighbour-

hood, and should have prevented criminal proceedings being initiated.

Whether or no Pooley's malady *ought* to have been discovered in the exercise of ordinary discrimination by those concerned in his trial—and whether the sentence pronounced against him was too severe—are questions which, it is admitted on all hands, might have been reasonably raised and temperately discussed. What we have to complain of in Mr. Buckle is, that, instead of taking this course, he indulges in the distortion of facts, intemperance, and personality in his commentary, and impropriety in his unsupported aggression on the reputation of an honourable man.

Mr. Buckle thought he had found out a case where certain persons, from religious bigotry and Christian fanaticism, had been persecuting the unbelievers, and he has used language towards them, and suggested motives in consequence which would be only justifiable if they were proved to be altogether bad and wicked people; but we have read, in a certain recent thick octavo volume, certain passages which we submit to Mr. Buckle's consideration and that of our readers. The author we refer to has said:—"It is an undoubted fact that an overwhelming majority of religious persecutors have been men of the purest intentions, of the most admirable and unsullied morals. It is impossible that this should be otherwise; for they are not bad-intentioned men, who seek to enforce opinions which they believe to be good. . . . Such men as these are not bad, they are only ignorant; ignorant of the nature of truth, ignorant of the consequences of their own acts. But, in a moral point of view, their motives are *unimpeachable*. Indeed, it is the very ardour of their sincerity which warms them into persecution. It is the holy zeal by which they are fired that quickens their fanaticism into a deadly activity." The writer then proceeds to illustrate the above remarks by referring, *inter alia*, to the inquisitors, the cruelty of whose conduct all must execrate, whilst the purity of their intention is shewn. Of the inquisition, indeed, in Barcelona, he records

that it has been admitted that all its members "were men of worth, and that most of them were of distinguished humanity." The above remarks are to be found in the "*History of Civilization*," (vol. i. pp. 167—171.) The writer is Mr. Buckle!

The inquisitors and Roman emperors who tortured Christians are well-meaning and virtuous persons, though zealots; but Mr. Justice Coleridge is — all that we have been compelled to repeat from Mr. Buckle's pen!

One consequence of the controversy has been, that Mr. Coleridge, in his reply, has been provoked to use language to the man who has improperly aspersed the character of Sir J. Coleridge, which of course it would, in some instances, have been better to have avoided. For example, the discussion is not advanced by the retort made on Mr. Buckle, that he is no gentleman. Such an allegation loses much of its force from its being so commonly used as a retort without reference to the fact. Thus, a disappointed cabman, or angry street-sweeper, employs this observation, and with the same nugatory result. However, we must admit the difficulty of keeping, under the circumstances of aggravation to which Mr. T. D. Coleridge was exposed, to only the most appropriate phrases. Mr. Buckle indeed admits that he has not so restrained himself. He says, and without any compunction, in his letter, in which he makes a rejoinder to Mr. Coleridge:—"When I held up to public opprobrium that, for our time, almost incredible transaction in which the name of Coleridge was painfully conspicuous, the indignation which I felt *prevented me from measuring my language*, and I did not care to search for soft and dainty words in relating how, under shelter of the law, an outrage had been perpetrated upon a poor, an honest, a defenceless, and a half-witted man. I wrote as I thought it behoved me to write, and I rejoice that I did so. Since, however, I did not spare the principal actors of that deed, I could not expect that Mr. Coleridge should wish to spare me; and I must, in common justice, acquit him of any such intent." Upon which we have to remark, that neither "indignation" nor

any other emotion should prevent a writer, who undertakes such a piece of criticism, from carefully "measuring his language." We do not care "for soft or dainty words;" but educated and conscientious men do demand of an author, who speaks so dogmatically and positively as Mr. Buckle, an accurate distinction between very different charges, and a proper selection of terms. If Mr. Buckle thinks it of any use to "call names," he should call the *right* names. If he has discovered, *e. g.*, that a learned judge has, in error of judgment, inflicted a penalty which, in Mr. Buckle's opinion, is excessive; instead of abusing him as stony-hearted, unrighteous, etc. etc., and holding him up to opprobrium in unmeasured terms, he would find it much more effectual to exercise true discrimination, and select appropriate terms to express his meaning.

If Mr. Buckle has only himself to thank for the bitter tone and personality¹ which find place in the controversy; and if sentiments "have been ascribed" to him which he "never entertained," he owes this also to his use of "unmeasured" language, and his intemperate, and rash, and indiscriminating abuse, and inability to see the distinction between what may have been an error of judgment and what was bad motive, between a miscarriage of justice and the iniquity of the Judge. In his ardour to fight the battle of freedom, he has run amuck, and, uncontrolled by reason, has overstepped the boundaries of fair observation and genuine criticism. We indeed give him credit, whatever others may do, for feeling a genuine indignation, and intending to do good service to a good cause—to make a telling and vigorous onslaught on what he may have deemed bigotry and cruelty.

Unlike Mr. Coleridge, we have sincere admiration for Mr. Buckle's talent, learning, and high literary attainments; but we

¹ He says, "I have displeased a large class of persons, who consider that an English judge occupies so elevated a position that he ought not to be made the object of personal attack." Nay, but he has displeased a large class who dislike to see a judge or any other person unjustly assailed; and he has mystified others who had been led to believe, from Mr. Buckle's brilliant commencement of a literary career, that he was not a man to commit himself so grievously by rashness of judgment and intemperance of language.

think, like the amiable persecuting Roman emperors and Spanish Inquisitors, without meaning to do any thing wrong or wicked, he has allowed himself to transgress very important laws, which ought to be observed equally among men of letters and gentlemen. He has moreover entirely missed his object ; his personal attacks are *mistakes*—obviously, and beyond all question. Every educated man in a rational state of mind sees this. The insults he has passed upon Sir John Coleridge being gratuitous, produce in us natural reaction—an indignation against Mr. Buckle himself, and the cause of liberty has not been aided by his effort.

If it had been essential for the cause of justice to comment on the principles involved in Pooley's case, the mode in which Mr. Buckle has addressed himself to the subject is the very way to distract the attention from them, and raise issues foreign thereto. But was it essential to raise the discussion again in any way other than that in which Mr. Mill has used it—as an illustration ? The trial had been discussed at the time, the wrong had been rectified two years before Mr. Buckle heard of it, and the Judge, who had thought it his duty to inflict the excessive penalty—for we think, on all grounds, it was excessive—was no longer on the Bench.

Mr. Buckle, moreover, has not used the occasion to point out, after all, the valuable point which the case mainly involves. It is here that society has, as Mr. Mill has shown, no moral right to suppress the maintenance of an argument, nor to restrain the expression of opinion because it is unpleasant to have antagonistic arguments published ; and further, it has no moral right even to feel aggrieved because of differences of opinion existing. Whenever it is alleged, as the reason for persecution, that those persecuted are wrong, and hold and profess marked opinions, it is clear that they who attempt to suppress heresies by force and persecution, are as yet unenlightened as to the mutual rights of members of society, and the principles of toleration and of pure liberty.

But it is, on the other hand, an infringement upon the rights of society when a man, or a body of men, insists upon intruding

opinions upon others; when no option is given the latter whether they will see or hear what is offensive to them, and especially so when their prejudices are attacked in a cruel and brutal way. Whether likely to lead to a breach of the peace or no, a man chalking up in prominent characters on public walls what he knows *must* be read by passers-by, and, being read, must shock and disgust, is morally and legally guilty of a grievous offence.

I may buy and read antichristian books if I please, or leave them alone, but I cannot help seeing filthy and contemptuous language publicly inscribed in the streets; and he who forces such on the notice of all his neighbours, young and old, rich and poor, is guilty of a crime, and should not be confounded with those who work and publish their views in the ordinary mode.

We here close our remarks on this topic; it is of a character which has rendered it an unpleasant duty to introduce it into our pages. Such a discussion generally involves, as it proceeds, more persons, and worse passions, and aggravations of all sorts. If we have "not mended matters," but added to the offence, which is likely enough, we regret it, and wish it were otherwise, but we shall not be astonished at it.

ART. II.—*A Practical Treatise upon the Law of Railways.*

By ISAAC T. REDFIELD, LL.D., Chief Justice of Vermont.
2nd Edit. Boston, U.S.: Little, Browne, & Co. 1858.

CERTAINLY the Law of Railways concentrates in itself the greatest number of interests. It is not shipping any longer, but railways, which on the whole present the grandest results of human industry. Speculative men see in them the adequate means for effecting unprecedented ameliorations, both moral and physical, in the condition of nations; practical men rejoice to note their incredible effects in facilitating, and in fact

in creating, habits of locomotion and social intercourse—in furnishing the supply almost contemporaneously with the demand—in accommodating the town by benefiting the country; or, if we take it that every one either travels, or sends, or receives goods by rail, in any view it is hardly possible to mention a branch of law possessing more varied points of attraction. There is interest in watching how the Legislature deals with these immensely powerful associations, whose influence is so wide that, as was stated a few months back in the House of Lords, scarcely one of its members could be said to be personally unconcerned in their shares. There is interest in remarking the aspect which the courts assume towards them—the *modus interpretandi* adopted in regard to the provisions which the legislature and the law lay down for the purpose of controlling those as well as other great corporate bodies: the ability with which old rules of the common law are made applicable to the questions, so often quite new, that arise in course of the fresh combinations and unprecedented circumstances produced by a mode of transit and carriage so foreign from the ideas of those who founded and those who built up the varied structure of English jurisprudence. With such a keen demand, then, as one would infer from the above considerations, that there must exist for a good practical Guide-book on railway law, why is it so difficult in this country to point out the treatise that is calculated to satisfy the need? Why is it that no work has assumed the position with regard to this subject that has been taken and maintained in regard to their respective subjects, by such works as Sugden on Powers, Abbott on Shipping, Chitty on Pleading, and others? The answer is this: Railway law is as yet unfinished, and, so to speak, is in the state of the new creation “pawing to set free its hinder parts;” consequently the good and sufficient book of to-day becomes in two or three years—such is the high-pressure speed of the decisions, aided oftentimes by legislative innovations—an imperfect and unsafe directory, because it of necessity contains nothing relative to the large field of questions that has been opened, and the fresh

ground that has been worked, since the date of its passage through the press. Besides, on a variety of questions respecting railways opinion is very much unsettled; so that that which an author may most judiciously, to all appearance, state to be the inclination of the courts on a particular question at the time he publishes, a few more decisions, or the accident of the reconsideration of the point in a Court of Error, shall in a few months, perhaps, turn into a misstatement. For instance, various opinions have been delivered both with reference to the grand questions of the degree in which the companies are liable for the safety of passengers, and the minor question of their liability touching the carriage of goods, and particularly of animals. Even the general question—Whether railway concerns are to be dealt with as monopolies, and be content to have meted out to them the stinted measure, and the hard rule, accordingly; or whether they are to be regarded as holding out to the public accommodations so excellent as to have attracted the universal public to them; the public being therefore under a species of *estoppel*, incapacitated, and disentitled to exact more from them?—cannot yet be said to be at all settled.¹

In this state of the case we have great pleasure in contributing to bring under the notice of our readers, the able and comprehensive work, the result of the labours of an American Chief Justice, the title of which heads this article. It will be found, we believe, to embrace nearly all that has been decided in England with reference to matters of general concern (omitting, of course, some few, and but few, which depend on legislation peculiar to England), adding also a large body of American decisions, and embodying much of the reasoning on which they proceed. It is a work, which there would be nothing surprising to us in finding, for some time to come, in much request among English lawyers, both because it contains what appears to us to be a valuable digest of the English cases, and because the added American cases not

¹ See the late case of *M'Manus v. the Lancashire and Yorkshire Railway Company*, 5 Jurist, N.S., 651, in the Exchequer Chamber.

unfrequently discuss, with great clearness, the vexed questions of the subject, and abound with argument and inference that may be expected to go a long way towards a solution of them, as they may come in future before our Courts. The above we state as the conclusion arrived at after a careful examination of the volume ; but we are far from asking of our readers to accept the estimate on that ground, and therefore in the residue of this article we shall endeavour to substantiate what has been advanced.

It may be well to preface what we are about to submit with this observation : That, owing partly to the more litigious habits of the people, partly to the passion for railway travelling and traffic which pervades North America, and partly to the fact that, in 1851, the number of miles of railway, in operation there, was nearly twice as great as in the United Kingdom in 1857 ; and that besides, in the former year, "nearly as much more was in progress, a large portion of which is now complete,"¹ the number and variety of reported decisions is far greater in the United States, in proportion to the population, than with us. Perhaps, also, another reason for the greater inclination which has been manifested there by the Railway Companies to defend actions, may not be unconnected with the state of things which the Chief Justice describes thus :—"In the United States a large proportion of the capital invested in railways has proved hitherto wholly unproductive, and much of it has already proved a hopeless loss, and a very small proportion of the whole can be said to be at all remunerative." Be the causes, however, what they may, the fact appears to be quite indisputable, that the American decisions on railway topics are not only more numerous than ours, but deal with a greater variety of questions, embracing all or nearly all that are familiar to our Courts, and also many that have not come before them. On the *ultra vires* question, there has been in America a large accumulation of decisions, and, as containing and discussing them, this book will be found well worthy of consultation by all who may hereafter

¹ Redfield on Railways, p. 5.

be called upon to beat over that ground. The strict rule repeatedly laid down here on this head by Lord Cottenham and Lord Langdale, appears to have been fully adopted in most of the United States. Indeed, in some respects, it seems to have been carried further than we have yet advanced; but, however this may be, it is settled in their courts to be a good defence to an action for calls, that they are wanted for objects alien from those that are within the constitution of the Company.¹

The subject of bye-laws appears to be treated at once neatly, succinctly, and fully; and perhaps the more attention and care have been bestowed on it, because here the author touches on one of the sore places of the railway system of his country. Some acquaintance with the works of most of the late travellers in North America had well prepared us for the following admission. After setting out the regulations of our Board of Trade, he says:—"The code of bye-laws framed by the Board of Trade in England for the regulation of travel by railway, . . . is certainly very judicious; and, if some similar one could be adopted and enforced here, it would accomplish very much towards security, sobriety, and comfort, in railway travelling, and tend to exempt the companies from much annoyance, and very often from loss."² In fact, among a number of points in which the comfort of travellers is less consulted in America than with us, nearly the only one in which they excel is this:—in hot weather the companies are generally in the habit, at each stopping-station, of supplying abundance of iced water for the gratification of the thirsty occupant of the sweltering car.

As we pass along, it may be well not to omit a specimen of the author's style, the more especially as it contains a sample of his mode of criticism on English authorities.

"In *Humble v. Langston*, 2 Railway Ca. 533, it is decided that upon the sale and transfer of the shares, where the purchaser's name is not substituted on the register of the company

¹ On this see Redf., §§ 56, 212.

² Redf., § 26.

for that of the seller, but the stock still standing in his name, he is thereby subjected to the payment of future calls; he cannot recover the money, of the purchaser, because there is no implied contract to that effect resulting from the transaction. This is certainly a most remarkable decision, and it is something of a task to be able to read the opinion of the court, by which this result is reached, with tolerable patience. The conclusion is certainly not fortified either by reason or analogy; and in *Cheltenham and Great Western Union Railway Co. v. Daniel*, 2 Railway Ca., 728, it is decided¹ that the purchaser of shares may, by way of estoppel *en pais*, be made liable for calls before his name is actually substituted, for that of the seller, upon the register of shares. If so, both parties are liable for the calls; and the seller, while his name remains upon the register, is the mere surety of the purchaser as to future calls. And what is a more natural or necessary conclusion in the mind of any one having the common sense of justice, than to imply, that while the purchaser suffers the seller's name to remain upon the register, and liable to the payment of calls, through his neglect, he does impliedly promise to indemnify him against all loss on that account? See *Burnett v. Lynch*, 5 B & C., 589. But the case of *Humble v. Langston* is re-affirmed in the subsequent case of *Sayles v. Blane*, 6 Railway Ca., 79. These cases can only be accounted for upon the principle of discouraging blank unregistered transfers, which have the effect to evade the stamp duties.—Shelford 108; and Report on Railways, 1839; No. 517, p. 4. Since writing the above, the late case of *Walker v. Bartlett*² has come to hand, where a blank transfer seems to be regarded as perfectly valid, and that the transfer in this mode does impose upon the vendee the duty of paying calls upon the shares while they remain his property. We may be allowed to say, that this result of the

¹ On the ground that all the machinery that the legislature had rendered necessary to constitute a member was dispensed with by the conduct of the parties.—S. C.

² 2 Jur. N.S., 643, in Err. from C. B., where Crowder J. yielded a reluctant assent to *Humble v. Langston*.

English decisions upon this subject is not altogether without gratification, as the former decisions had so effectually mystified the subject, that it seemed not improbable that the difficulty of comprehending them might very likely be ultimately found with ourselves, rather than at the door of the eminent jurists who have so long clung to the now acknowledged inconsistencies of *Humble v. Langston*, which pertinacity in error, as a general thing, is far more uncommon in Westminster Hall than with courts of less experience. Men of the learning and experience of the English judges generally feel that they can afford to acknowledge their common share of human fallibility without serious prejudice."¹ It is impossible to avoid adding, that of the Barons of the Exchequer who decided *Humble v. Langston*, only one remained on the bench at the date of the decision of *Walker v. Bartlett*; and that learned judge, together with two of the three judges who decided *Sayles v. Blane*, were consenting parties to the decision of *Walker v. Bartlett*.

Then the learned Chief Justice of Vermont, in speaking of the pertinacity with which error has been clung to, appears to labour under a misconception. The judges who decided *Humble v. Langston*, never had an opportunity of revising the opinion of their court in that case: no case having ever subsequently come before them, putting to the test whether they clung to, or resiled from, that decision. In *Sayles v. Blane* the three judges who decided, did so in deference to the deliberate decision of a court of co-ordinate jurisdiction, as did the Court of Common Pleas with the case of *Walker v. Bartlett*.²

When a rule is once laid down by a court of competent jurisdiction, it is surely most desirable, for the sake of uniformity of adjudication, that the rule should be adhered to until reversed in a court of error: certainly that practice is the only one that can be followed with the hope of maintaining, in due authority, the three co-ordinate common law judicatures of England.

¹ Redf., pp. 47, 48.

² 17 C. B., 454—460.

It is unnecessary to mention that, in case of railway companies here, the shareholders are liable to the extent of unpaid up shares, &c., to judgment creditors of the Company; but in the United States there is, for the most part, no provision of that nature; hence this and the general question of liability of a trading company on its dissolution, have been much more fully discussed than with us. What is to be done with the liabilities and rights of an incorporated body on the dissolution of the corporation? is always a difficult inquiry. The reader will, we think, find it handled in this work in a satisfactory manner,¹ and more elaborately in the cited case decided by six judges, the three others dissenting, of the Supreme Court of the United States; or, as Chief Justice Redfield calls it, "the national tribunal of last resort."² They decided that, "on the dissolution of a corporation, its effects are a trust fund for the payment of its creditors, who may follow them into the hands of any one, not a *bonâ fide* creditor or purchaser without notice."

We must pass over the Chief Justice's elucidation on what is called in America, from the civil law, the doctrine of "eminent domain," and what we, in plainer English, should call the principle which attributes to the sovereign the prerogative or power of interfering with private property for great public objects, and on occasions when the necessity of the case admits of no alternative. Such is the prerogative or right of entering on the lands of the subject adjacent to the sea, to erect bulwarks, &c., on prospect of invasion, &c.; and the principle governs questions relating to compulsory taking of lands for the purpose of railway and other works.³ We cannot do more than that, which it is worth while, however, to do, viz.—quote the language of the Chief Justice of the Supreme Court in reference to the construction to be put on powers of this kind given to companies:—"It would present a singular spectacle if, while the courts of England are restraining,

¹ Redf., § 50.

² *Curran v. State of Arkansas*, 15 Howard R., 304, 305—321.

³ He refers (Redf. § 63) to Tacit. Ann. I., § 75; Plin. Hist., xxxvi., § 2, the reference being an error, and states *Clarence River Bridge v. Warren Bridge*, 11 Peters, 420, in the Sup. Court of U. S., to be their leading case on the subject.

within the strictest limits, the spirit of monopoly and exclusive privilege in nature of monopoly, and confining corporations to the privileges plainly given to them in their charter, the courts of this country should be found enlarging those privileges by implication." The principle of compensation, which is founded in justice, and recognised by the best jurists, is fully and frankly acted on in America, where, as a rule, no man is called upon to part with his property for state purposes, except upon an equivalent *previously* provided by the state;¹ the rule being subject, it may be presumed, to the fact that it is, in general, impossible to ascertain, till the work is done, what shall be a just amount of compensation.²

The principle in its fullest development has only been adopted, in our law, on some particular heads; *ex. gra.*, in questions of the making of highways, as in 1 and 2 Will. IV., c. 43. In Scotland they are more liberal, at least to themselves.³ Some of the American decisions on this head of eminent domain, seem not a little wild and extravagant. It has been held, in one of their courts of error, to be a perfectly proper exercise of the rights of eminent domain by a legislature, to empower a railway company to run cars, worked by steam power, along the main street of a city,⁴ without any compensation for the privilege being payable to any one. In other states, it is true, the law is differently expounded. In Vermont the courts have held taking of land for a public highway, is not appropriating it to public use, within the meaning of the constitution of that state, which requires compensation in such cases to be made "in money;" but that this provision only applies where the fee of the land is taken; and that, where an easement only is taken, for the purpose of a high-

¹ 2 Kent Com., 399, 8th Edit. So Grotius, De Jure B. and P., iii., cap. 19, § 7; cap. 20, § 7, and other authorities cited by Chancellor Kent. So the Code Napoleon, art. 545.

² *Lister v. Lobley*, 7 A. & E., 133.

³ Bell's Principles, &c., p. 173.

⁴ 2 Kent Com., 403, 404; Redf. § 76. This is matched by a decision that a bowling-alley kept for gain in a village is a nuisance at common law. *Id.* See Redf., § 76.

way, and the remaining lands is worth more than the whole was before the laying out of the road, the party is entitled to no compensation.¹

Owing to that provision in the constitution of the United States, which prohibits the state legislatures from passing any law impairing the obligation of contracts, many curious questions have arisen in the attempt to ascertain the proper limits of the restriction thus imposed upon each sovereign state. The Judges of the Supreme Court of the United States, who are expressly empowered to decide upon the constitutionality or otherwise of all laws, passed as well by the State Legislatures as by Congress itself, have been in former times, and are, we believe, now, far from unanimous on this subject. Among these questions is that of the duration of privileges or franchises conferred upon a corporate body. In America, these are, at present, whether given by express words or by implication, regarded as irrevocable, and inviolable by any subsequent legislation; though this doctrine does not go so far as to exclude others, whether individuals or corporations, from the grant of similar privileges or franchises if the legislatures see fit.² In this country, whilst the sovereign was the only known source of incorporation, the principle was laid down that the king could not dissolve a corporate body; and the same principle was maintained long after the sovereign ceased, in practice, to be the only creator of corporations; but no doubt the whole legislature has always had the inherent power of destroying any corporate existence, though it only appears to have exercised the power in the cases of the knights templars, temp. Edw. II., and the religious houses, temp. Hen. VIII.

The Chief Justice is an ardent admirer of the beautiful simplicity with which the courts of law in this country, in former times, invested their decisions as to carriers' responsibility, and hails some late decisions³ as indicating an intention to restore, as far as practi-

¹ *Livermore v. Town of Jamaica*, 23 Verm. Rep., 361; Redf., § 71, and this mode of reckoning is adopted in some states, though rejected in most.

² See Redf., §§ 70, 231.

³ *Ex. gra.*, *Horn. v. Lond. & S. W. Ry. Comp.* 1 Jur. N.S., 236.

cable, the reasonable responsibility of carriers, and return again to the spirit of that line of decisions in which the nail indeed was hit, but hit with a sledge-hammer.¹ In the state of New York the courts at one time held, that it is not competent for carriers to exonerate themselves from their general liability, either by notices brought home to the owner of goods at the time they are deposited for carriage, or even by express contracts to that effect; but the law is differently held now.² In other states, when the question has arisen whether notice would excuse the liability of the carrier, it seems to have been taken for granted that a special acceptance of the terms of such notice would have that effect. The same law is held in the Supreme Court of the United States,³ which observed, in a case where the question was much discussed,—

“The owner of the goods, by entering into the contract, virtually agrees that, in respect to the particular transaction, the carrier is not to be regarded as in the exercise of his public employment, but as a private person who incurs no responsibility beyond that of an ordinary bailee for hire, and answerable only for misconduct or negligence.” The reader must judge for himself as to the wholesomeness of this view. In Vermont the court says—“We are more inclined to adopt the view which the American cases have taken of the subject of notices by common carriers, intended to qualify their responsibility, than that of the English courts, which they have in some instances subsequently regretted. The consideration that carriers are bound, at all events, to carry such parcels, within the general scope of their business, as are offered them to carry, will make an essential difference between the effect of notices by them and by others, who have an option in regard to work which they undertake. In the former case, the contractor having no right to exact unreasonable terms, his giving public notice that he shall do so, where

¹ Redf., §§ 132—134, 140.

² Redf., § 132, note (3).

³ *New Jersey St. Nav. Comp. v. Merchants' Bank*, 6 How., 382.

those who contract with him are not altogether at his mercy, does not raise the same presumption of acquiescence in his demands, as arises in those cases where the contractor has the absolute right to impose his own conditions. And, unless it be made clearly to appear that persons contracting with common carriers, expressly consent to be bound by the terms of such notices, it does not appear to us that such acquiescence ought to be inferred."¹

In some parts of America they consider each carrier, in the absence of special contract, to be liable only to the extent of his own route, and for safe delivery to the next carrier, as in *Garside v. Trent and Mersey Navigation Company*,² preferring that to what has been called the "absurd extreme" to which the courts of this country have gone, when they decided, as in *Muschamp v. Lancaster and Preston Junction Railway Company*,³ that the first carrier upon a route occupied by a succession of carriers, is liable for the safe delivery of all articles at their ultimate destination. In Pennsylvania the English rule is fully established, and it is the doctrine which is likely, according to the learned Chief-Justice Redfield, to prevail in the courts throughout the United States. We cannot leave that part of this treatise, which deals with the relations of railway companies as common carriers of goods, without venturing to submit an opinion, that it will be found especially deserving of the notice of English lawyers.

To the reader who has acquired some idea of the enormous multitudes who travel by rail in America—the recklessness of the conductors—the deficient state of the permanent ways, and of the rails themselves for the most part, and the number of accidents which happen—it will perhaps be matter of some surprise to find the law respecting railway companies, as common carriers of passengers, contained in this work in eight and-twenty pages. Still, much valuable matter is there. The rule laid down in this country, respecting the amount of care and diligence required by the law from the stage-coach proprietors,⁴ has been very generally

¹ *Farmers' and Mechanics' Bank, v. Champlain Transportation Company.* 23 Verm. R., 186.

² 4 T. R., 581.

³ 8 M. and W., 421; see 23 Verm. R., 209.

⁴ *Crofts v. Waterhouse*, 3 Bing., 319.

adopted and applied to the protection of railway passengers in the United States.¹ The learned author expresses himself on this subject thus:—"If the degree of care and watchfulness is to be in proportion to the importance of the business, it is scarcely possible to express the extreme severity of care and diligence which should be required in the conduct of passenger trains upon railways. *Hence very few cases of accident and injury have occurred where it was not considered, in some measure, attributable to a want of the requisite degree of care.*" With regard to the vexed question in this country, as to whether the fact that an injury is suffered, by any one while a passenger by railway, is to be regarded as *prima facie* evidence of the company's liability, the courts of the State of New York, and the Supreme Court at Washington, have adopted the opinions of our judges who have ruled in the affirmative;² in some of the other states the law seems to have been differently laid down.³ In Pennsylvania it has been decided, that where passengers "are liable to have their arms caught in passing bridges if lying out the windows," it is the duty of the conductors of the train to give such notice to them as will put them effectually on their guard, or the company are liable for all such injuries; and it is not sufficient to trust to printed notices put up in the cars.⁴ Cases of liability where the company carry gratuitously have come under a good deal of discussion in America. The case of the newspaper reporter travelling with a free ticket is well known among English railway cases. In the United States has occurred a case of this kind in the National Tribunal of last resort, where the plaintiff recovered. He was president of another railway company, and was, at the time of the accident, travelling without charge, and by invitation of the president of defendants' line, in a special train running for the accommodation of the officers of the company. The collision

¹ Redf., § 149, so ruled in the Supreme Court of the United States; 13 Peters' R., 190.

² See *Carpue v. London and Birmingham Railway Company*, 5 Q. B., 747, and other English cases; and see Redf., p. 326.

³ Redf., pp. 326, 327.

⁴ *Laing v. Calder*, 8 Penn. R., 483, sec. 21, vol. 203.

occurred by reason of another train coming in the opposite direction, in disobedience of orders to keep the track clear; and in the collision the plaintiff was hurt. It was laid down that the confidence induced by undertaking any service for another, is a sufficient legal consideration to create a duty in the performance of it. Where carriers undertake to carry persons by the powerful but dangerous agent of steam, public policy and safety require that they be held to the greatest possible care and diligence; and whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance, or the negligence of careless agents. Any negligence in such cases may well deserve the epithet of "gross."¹ The proposition has been stated in the courts of the State of New York, with the complete acquiescence of Chief-Justice Redfield, that railway companies are not bound to the same degree of care in regard to mere strangers who may voluntarily, but unlawfully, go upon their track, which they owe to passengers conveyed by them.² It seems to be regarded as well settled in America, that a passenger who is induced to leap from the carriage, by a well-founded apprehension of peril to life or limb, induced by any occurrences which might have been provided against by the utmost care of the carriers, is entitled to recover for any injury he may thereby sustain, where no injury would have occurred if he had remained quiet, or where his own conduct contributed to produce or enhance the injury.³

The statute 9 & 10 Vict., c. 93, commonly called Lord Campbell's Act (called by Chief-Justice Redfield Lord Denman's Act, by mistake), providing for compensation in certain cases of deaths by railway, &c., accidents to passengers, &c., has been re-enacted in most of the American States;⁴—no small tribute to the inherent justice and propriety of the measure. Some curious

¹ *Derby v. Philadelphia, &c., Railway Company*; 14 Howard, 483; and see as to gross negligence, a case confirming the former, *Steamboat, New World v. King*, 16 Howard, 468, 474.

² Redfield, p. 332.

³ *Ibid.*, § 151.

⁴ *Ibid.*, § 152.

examples of the application of these statutes are given in this part of the work.

As regards keeping time on railways, the author thinks that, on general principles, railways should be liable for not delivering passengers within the stipulated time, as much as for not delivering goods according to their undertaking, and he pronounces some powerful strictures on the well-known English case of *Hamlin v. the Great Northern Railway Company*, the rule in which he conjectures will not be followed in *Westminster Hall*.¹

On the subject of railway stock, bonds, mortgages, &c., comprised under the general term of railway investments, the author professes it not to be in his power to give much information, "and none probably which will afford relief to those who have adventured their money in these enterprises, which so generally, in this country, have proved unproductive."² In fact, it seems that but few questions on the subject have been definitively settled among the Americans, and those for the most only of secondary importance in comparison to those which yet remain to be decided. The author, however, is particularly powerful upon the subject of fraudulent schemes and bubble investments, which he has deemed it not improper to expatiate upon at great length, not sparing the conduct of the State Legislatures, in neglecting to establish sufficient preventives to such schemes going into operation, because of the far greater severity and extent to which losses arising thereby are felt throughout society in America than in older states. "Here we have no national funded stock, in convenient sums, for small investments, and which, being sure, is really a great blessing to the mass of those who wish to invest moderate sums, as a protection against age or calamity."³ Railway rolling stock has, in some of the cases decided in that country, been regarded in the nature of fixtures; *ex gra.*, they are included in a mortgage of the railway, entitling the mortgagee to them as against a judgment creditor; but the author does not fully assent to this.⁴

¹ Redf., § 154.

² Ibid, § 234.

³ Ibid, pp. 568, 569.

⁴ Ibid, § 235, note (21.)

On the whole, we are persuaded this work will take its place among the many valuable contributions which America has made to our law libraries; it has been prepared with infinite care. On its arrangement, which is excellent and most easy of reference, very great labour must have been bestowed; the typography is beautiful; it is printed, indeed, with an accuracy of which very few English books can boast. The author states his authorities with remarkable fidelity, and draws conclusions in which we should anticipate very general acquiescence in this country. In fact, almost the only blemish we have remarked, consists in occasional mistakes as to matters of practice, and of history, in regard to the English courts, etiquettes, usages;—with one of these (which in all are very few) we will conclude. The author, in a note to his chapter on *Mandamus*, referring to a case in the Queen's Bench,¹ where the *Council* of a borough were ordered to pay costs, tells us, "*Counsel* are, in the English practice, required to pay costs occasioned by their delay!"

¹ Redf., § 190, p. 445.

ART. III.—CURIOSITIES OF LAW.

2. AN ENGLISH BOROUGH IN THE FOURTEENTH CENTURY.—
CUSTUMAL OF ROMNEY.

“THE general outline of an urban constitution, in the earlier days of the Saxons,” says Mr. Kemble, “may have been somewhat of the following character :—The freemen, either with or without the co-operation of the lord, but usually with it, formed themselves into associations or clubs, called *gylds*. These must not be confounded either on the one side with the *houses* (in Anglo-Saxon, *hósa*), i. e., trading guilds, or on the other with the guilds of crafts (*collegia opificum*) of later ages. Looking to the analogy of the country-gylds or tithings, described in detail in the ninth chapter of the first book, we may believe that the whole free town population was distributed into such associations ; but that in each town taken altogether, they formed a compact and substantial body, called in general, the *Burhware*, and perhaps sometimes more especially the *Ingang burhware*, or burgher’s club. It is also certain, from various expressions in the boundaries of charters, as “Burhware mæd” (burgher’s mead), “burhware mearc,” and the like, that they were in possession of real property as a corporate body. Whether they had any provision for the management of corporation revenues, we cannot tell ; but we may unhesitatingly affirm, that the *gylds* had each its common purse, maintained, at least in part, by private institutions, or what we may more familiarly term *rates* levied under their bye-laws. These *gylds*, whether in their original nature, religious, political, or merely social unions, rested upon another and solemn principle. They were sworn brotherhoods between man and man, established and fortified by “ath and wed,” oath and pledge ; and in them we consequently recognise the germ of their sworn communes, *communæ* or *communice*, which, in the times of the densest seignorial darkness, offered a noble resistance to episcopal and

baronial tyranny, and formed the nursing-cradles of popular liberty. They were alliances, offensive and defensive, among the free citizens, and in the strict theory possessed all the royalties, privileges, and rights of independent government and internal jurisdiction. How far they could make them valid depended entirely upon the relative strength of the neighbouring lord, whether he were ealdorman, king, or bishop. When they had full power they probably placed themselves under a *geréfa* of their own, duly elected from among the members of their own body, who thenceforth took the name of *port-geréfa*, or *burh-geréfa*, and not only administered justice in the *burhware-môte* or husting, on behalf of the whole state, but, if necessary, led the city train-bands to the field. Such a civic-political constitution seems the germ of those later liberties which we understand by the expression, that a city is a county of itself—words once more weighty than they now are, when privilege has become less valuable before the face of an equal law. Nevertheless, there was once a time when it was no slight advantage for a population to be under a portreeve or sheriff of their own, and not to be exposed to the arbitrary will of a noble or bishop, who might claim to exercise the comital authority within their precincts. Such a free organization was capable of placing a city upon terms of equality with other constituted powers; and hence we can easily understand the position so frequently assumed by the inhabitants of London. As late as the tenth century, and under *Æthelstan*, a prince who had carried the influence of the crown to an extent unexampled among any of his predecessors, we find the burghers treating as power to power with the king, under their portreeve and bishop, engaging indeed to follow his advice if he have any to give which shall be for their advantage; but, nevertheless, constituting their own worn *gyldship* or commune, by their own authority, on a basis of mutual alliance and guarantee as to themselves seemed good. The rights of such a corporation were, in truth, royal. They had their own alliances and feuds; their own jurisdictions, courts of justice, and power of execution; their own markets and tolls; their own power of internal taxation; their

personal freedom, with all its dignity and privileges. And to secure these great blessings, they had their own towers and walls and fortified houses, bell and banner, watch and ward, and their own armed militia.

This picture is intended to apply to the earliest times in our history of which we have distinct traces ; but the pertinacity of our ancestors in sticking to their rights and customs, preserved the essential features of the Saxon town the same through many an age, and many a civil storm. Under the Norman kings, the old customs used "from time whereof the memory of man ran not"—that is, anterior to all record, and only resting upon tradition from father to son—were clung to with invincible determination, and the towns continued to extract from one monarch after another, charters by which these customs were recognised and confirmed. Slight changes may from time to time have crept in as the altered state of circumstances required. Under the Norman kings new conditions arose ; and the retention of the old rights and privileges was sometimes bought by submission to the general regulations which these monarchs imposed. The old language gradually changed, and legal terms of French origin, were introduced in the place of the vernacular Saxon ones, of which the meaning was frequently lost even when the words themselves were retained. But substantially it would seem that the towns resolutely maintained their ancient usages and modes of procedure ; and thus the municipal regulations of a borough in the fourteenth century may be considered as no very distant likeness of those of the ninth or tenth.

With the Reformation very considerable changes took place, and during the sixteenth and seventeenth centuries the circumstances of the borough towns were greatly altered. Places which had been once flourishing emporiums of trade, sunk into poverty and insignificance ; and the memorials of their former greatness only remained in a few old records, and the right which they still retained of being represented in parliament.

The Cinque Ports—that is, the towns of Dover, Hastings, Sandwich, Hithe, and Romney, with their members or adjacent

towns, Rye, Winchelsea, and others of smaller note, are examples of this mutability of mundane affairs. These towns once formed a little confederacy of republics, each governed by its own customs and laws, and all banded together to resist the encroachments of external powers, whether seignorial, episcopal, or regal. Few of them now retain any outward marks of their former importance. Of most of these places the customals and records have been preserved. In Lyon's History of Dover Castle, the customals of Dover, Sandwich, Hastings, Hithe, and Romney, are given in English, from manuscripts of the sixteenth century. That of Romney seems to have been made from an original of an earlier date than the rest, and has been transcribed or translated by some one who did not entirely comprehend the meaning of his text, as mistakes and obscurities occur. The Tudor period had already set in, and the old French terms were beginning to become obscure when this translation was made.

We have lately fallen upon a copy of the custumal of this town (unfortunately imperfect) in its original French. It is contained in the Registrum of Daniel Roughe, town-clerk of the jurats of Romney, from the twenty-seventh year of Edward III. (A. D. 1353) until the fourth year of the reign of Richard II., a MS. which furnishes a mass of formularies of all sorts in use in the fourteenth century. The volume containing this curious record is preserved in the library of St. Catherine's Hall, Cambridge. We propose to present our readers with a copy of as much of the custumal as is preserved, and some of the forms of procedure, which together give a lively picture of Romney in its best days, when it was a flourishing port, and a leading member of the little group of towns which once were looked upon as the guardians of England against the attacks of France.

We have endeavoured to make our translation as literal as possible, and we have placed the original French on the opposite page.

THESE are the customs of Romney, from time whereof memory runneth not, there used.

Imprimis. It is used from year to year to elect twelve jurats to guard and govern the said town, according to the points of their commission given to them.

[Some illegible lines follow, and then comes the commission in Latin, of which only the last lines remain.]

* * That they be held to render to us a reasonable account of all their receipts and expenses, and we will thereupon give them a reasonable acquittance. In witness of all which things we have caused these present letters, which are to last for one year from the aforesaid day of making, to be sealed with the aforesaid common seal of our commonalty. Given in our full commonalty, on the day and year aforesaid.

The form of the acquittance thereupon.

To all to whom these present letters shall come, the barons of Romney send greeting. Whereas A. of B, &c., our fellow-barons, were elected by us in full commonalty to govern our commonalty, but so that they should be bound to account to us for receipts and expenses, and that they should assess no new rate without the consent of the commonalty, as in the commission by us given to them is more fully contained; and now, our aforesaid barons have rendered to us a faithful account of all receipts and expenses, according to the form of the commission given, we, willing to do justice to them, as we are bound, do absolve them for ever from rendering any further account, and from all charge, by reason of the conservation of the aforesaid commonalty, and the administration of the goods of the said commonalty, before the day of the making of these presents; and of all claim, action, and demand touching the said commonalty, we, for ourselves and our heirs, do proclaim them quit by these presents. In witness of which we have caused the seal of our commonalty to be affixed to these present letters, on the day and year, &c.

2. If any one will not serve the office of jurat.

Item.—If any baron, after election by the said commonalty,

Ceux sont les usages de Romney de temps dont memorie ne court, ilukis usés.

1. In primes use est de an en an eslire XII. jurés pur garder et gouverner la dite vile, solom les points de lour comission a eux fait.

* * * * *

* * Quod de omnibus receptis et expensis suis compotum rationabilem nobis reddere teneantur, et nos eisdem rationabilem acquietanciam super hoc faciemus. In quorum omnium testimonium, presentes literas a die confectionis predicto per unum annum duraturas, sigillo comunitatis nostre predicto fecimus consignari. Datum in plenâ comunitate nostrâ die et anno supradictis.

Forma acquietancie super idem.

Universis ad quos presentes litere pervenerint, Barones de R. salutem. Cum A. de B., etc., combarones nostri in plenâ comunitate per nos fuissent electi ad regendam comunitatem nostram, ita tamen quod de receptis et expensis tenerentur nobis ad compotum, et quod novum scottum non assiderent sine consensu comunitatis, prout in comissione eis per nos factâ plenius continetur, ac jam predicti barones nostri nobis fidelem compotum de omnibus receptis et expensis juxta formam comissionis facte reddiderint; nos eisdem justiciam facere volentes, ut tenemur, eos ab ulteriori compoto reddendo et ab omni onere ratione conservacionis comunitatis predictæ et administracionis bonorum dictæ comunitatis ante diem confectionis presentium, absolvimus in perpetuum et ab omni calumpniâ, actione, et demandâ dictam comunitatem tangentibus pro nobis et heredibus nostris quietos clamamus per presentes. In cujus testimonium sigillum nostre comunitatis presentibus literis fecimus apponi, die etc., anno etc.

2. Si ascun ne voile feire le office de juré.

Item.—Si ascun baron après la élection de la dite comune, ne

will not be obedient to serve the said office of jurat, the bailiff, or all the commonalty, shall go to his house, and the said disobedient person, his wife and his children, and the rest of his family, they shall oust from the house, and shall close the windows, and his goods shall they seal up and sequesterate, and so they shall remain until he is willing to submit to do the said office of jurat.

3. Sequestration infringed.

Item.—It is used, if the sequestration of the commonalty be broke by him upon whom the sequestration is made, or by any of his people, that the trespasser be attached and put in prison, without any deliverance being made until he will submit himself, and give satisfaction to the commonalty for the infringement.

4. The jurats may distrain.

Item.—It is used that the jurats may, by virtue of their office, take distress and make sequestration, without bailiff, for debts due to the commonalty; and so may their sergeants, by commandment of the said jurats.

5. The jurats may make attachment.

Item.—The said jurats may make attachment, without the bailiff, upon all those whom they find rebels touching the service of our lord the king, and in all other points that touch the maintenance and profit of the common freedom of the town; and the said rebels, according to the quantity of their trespass, they may punish.

6. Also they shall be sworn.

Item.—It is used from year to year, that at what hour the said jurats are elected by the commonalty, they shall be sworn, each by himself, the freedom and the customs of the commonalty to maintain, and the great and the little according to their condition uniformly to guide, and the points of their commission to maintain; and so also shall the clerk and the sergeant be sworn.

7. Common clerk and sergeant.

Item. It is used that at what hour the said jurats are sworn, they may take a clerk and a sergeant, as they may agree by bargain between the said jurats, clerk, and sergeant. And also the said jurats may take in each ward two sergeants at their pleasure,

voile estre obeisaunt à fere la dite offis de juré, le bailif od tote la comune iroint à sa meson et le dit desobeisant, sa femme et ces enfants et autre mayné osteront de sa meson, et fermeront ces fenestres et ces us deyvont ils aseler et sequestrer, et ci ils deyvont demurer tank il se voile justizer à fere la dite office de juré.

3. Sequestre fraint.

Item.—Use est, si sequestre de la comune soit fraynt par cel sur ki la sequestre soit fait ou par ascun de siens, soit le trespasour ataché et mys en prison, sanz nule délivrance faire, tank il se voile justizer et gré fere a la comune pur la freynonce.

4. Les jurés pount destreindre.

Item.—Use est ke les jurés pount par vertue de lour office prendre destresse et sequestre fere sanz bailif pur dettes dues a la comune, et ci pount lour serjants par comondement de les dits jurés.

5. Jurés pount fere attachement.

Item.—Pount les dits jurés fere attachement sanz le bailif sur tous iceux quils trovont rebels, tochoint le service nostre Seigneur le Roy, et en tous autres poynts que tuchont la mayntenonce et le profit de la comune franchise de la vile, et les dits rebels solom la quantité du trespas puniser.

6. Auci seront ils jurés.

Item.—Use est de an en aun, a quel heure que les dits jurés sount par la comune elluz, ils deyvont estre jurés, chascun par soi, la franchise et les usages de la comune mayntener, et les grants et les petits solom lour afferont unement amener, et les poynts de lour comission mayntener, et issynt deyvont le clerk et le serjant estre juré.

7. Comune clerk et seriant.

Item.—Use est qe a quele heure qe les dits jurés sont jurés, pount prendre un clerk et un seriant com ils pount par entre les dits jurés clerk et seriant acorder par bargeyn. Et auxi pount les dits jurés prendre en chescun garde ij seriants que lour

to levy their rates in their ward by their commandment, and to this shall they be sworn without taking any bargain of the said commonalty.

8. If any abuse a jurat.

Item.—It is used that if any man abuse any of the jurats, or lay hands on him, by which the peace of our lord the king is troubled, the bailiff has power to attach him, and put him in prison, without deliverance being made until he shall have satisfied the commonalty by taxation of the other jurats; and also that he be not delivered until he hath made satisfaction therefor to the jurat against whom the trespass was done, as they shall agree between themselves, or by taxation of the other jurats, and in like manner towards the clerk and sergeant.

9. Fighting in presence of the jurats.

Item.—It is used that if fighting or riot be made in the presence of the jurats, or of any jurat, the said jurats or jurat may attach the parties in maintenance of the peace of our lord the king, and send them to prison, and deliver them to the bailiff, together with the cause. And the said bailiff shall receive them and put them in ward, until one and the other party have found good security for the peace; and upon that shall they be liberated, and the sergeant of the bailiff shall have his fee of the one and the other, and such attachment may each jurat make in the absence of the bailiff.

10. A free man may distrain.

Item.—It is used that every free man dwelling in the said franchise may, in the absence of the bailiff, distrain his foreign debtor by his goods found within the said franchise, and deliver it to the bailiff with his plaint; and the bailiff shall receive the distress, and shall give a day to the parties upon the plaint. And it is to be observed, that notwithstanding the said free man may take distress in the manner aforesaid, yet may he not deliver it without the bailiff.

11. The bailiff shall not break open a writ.

Item.—It is used that, at what time our lord the king and our warden sends his writs to the bailiff and barons, the bailiff shall

plerount, à lever leur culets en leur garde par leur comondement et à ceo deyvent ils estre jurés, sans nule bargeyn prendre de la dite comune.

8. Si ascun maudie jurés.

Item.—Use est, que si ascun maudie ascun des jurés ou met mayn sur lui, par kai la pes nostre Seigneur le Roy soit trubblé, ait le bailif power de lui attacher et mettre en prison sanz délivrance faire, tank il avra fait gré a la comune par taxacion des autres jurés. Et auxi kil ne soit delivré tank il en ath fait gré al juré vers ki le trespas est fait com ils purount entre eux accorder, ou par taxacion de les autres jurés, et en mesme la manere vers clerk ou serjant.

9. Contak en presence jurés.

Item.—Use est que si contak ou riote soit faict en présence des jurés ou de ascun juré, les dits jurés ou juré pount atacher les parties en mayntenonce de la pees nostre Seigneur le Roy, et les amener à prison et les délivrer à bailif ensemblement od la cause, et le dit bailif les receyvra et mettra en garde tank lun et lautre partie ount trové bone sécurité de la pees, et sur ceo soient ils delivrés et le serjant du bailif aura son fee de lun et lautre, et tiel atachement puet chescun juré faire en absence du bailif.

10. Frank home puet destreyndre.

Item.—Use est que chescun frank home receant deyns la dite franchise puet destreyndre en absence de le bailif son foreyn detour par son chatel trové deyns la dite franchise et le délivrer à bailif ove sa pleynte et le bailif receyvra la destresse et dorra jour à les parties sur la pleynte. Et fait à saver que nekedent que le dit frank puet prendre destresse en la manière susdit, il ne la puet délivrer sanz bailif.

11. Le bailif ne brusera mandement.

Item.—Use est que à quele heure nostre Seigneur le Roy et nostre gardeyn mande ces mandements as bailif et barons, le

not break open the writs, except it be in the presence of the jurats; nor may the jurats break them open in the absence of the bailiff. If he bear a charge, the bailiff shall cause the common-horn to be blown at each corner of the town three times, and shall cause the said writ to be read in the place where he holds his courts.

12. Chattels of heirs.

Item.—It is used that in case a man and his wife, dwellers and free in the said town, have children between them free born, and the father and mother die, or the father die and the widow take another husband, or she die a widow, then the goods and chattels in the hands of the executors or administrators, found within the franchise, shall be seized by the jurats; and they also (*i. e.*, the executors or administrators) distrained by all their own chattels, until they (the jurats) have knowledge of the chattels which ought, of right, to come to the children, as well of the reasonable part, as of the part bequeathed. And when they have knowledge of the quantity of the said chattels, they shall deliver them to him who is the nearest of blood, to whom no inheritance can descend, who, of right, shall have the ward if he will sue for it, finding sufficient pledges; and he, and also his pledges shall be bound to the jurats, in the name of the commonalty, and to the executors, to answer for and deliver to the children their chattel, when they come to their full age, and to keep without spoil or waste their lands and tenements which are within the franchise; and this bond shall be made by indenture, in three parts, and sealed with the common seal; of which indenture one part shall remain in the hutch (*i. e. box*) of the commonalty, to testify to the said thing; and the second part of the indenture shall remain in the hands of the executors; and the third part of the indenture in the hands of those who have the said children in ward; and in case that he who is nearest in blood is not willing to sue for the children to have the wardship, and to answer, as is above said, the jurats in maintenance of the franchise, shall deliver the said children, their chattels, their lands, and their tenements to another good and lawful man of the town,

bailif ne brusera les mandements si il ne soit en présence de jurés, ne les jurés deyvent bruser en absence du bailif. Si il porte charge, le bailif fera soner le corn comune à chescun angle de la vile iij foitz, et fera lyre le dit mandement en lu ou yl tynt ses cours.

12. Chatteux de heires.

Item.—Use est que en cas que homme et femme receants et frank deyns la dite vile eyont enfans par entre eux frank engendrés, et le père et la mère devyont ou le père devye, et la veve preigne autre mary, ou quele murge veve, soient le bienz et les chatteux en les mayns de les exsecutours ou ministres trovés deyns la franchise par les jurés arescuz, et auxi par tut lour mesme chatel destreynt tank ils ayont conusance del chatel que avener deit de droit à les enfans, auxi com du rat porcion com de legat. Et quant ils ont conusance de la quantité du dit chatel, ils le delivreront à celui quest plus procheyn de sank, à ki nule heritage puet descendre, que de droit aura la garde si il voile pursure, trovont suffisants plegges, et lui et mesmes les plegges liés à les jurés en nom de la comune et à les exsecutours à respondre et delivrer à les enfans lour chatel, qant ils vignont à lour pleyne age et de lour teres et tenements que sont deyns la franchise sans estreper et wast garder. Et ceste lié sera fait per endenture en tres parties, et aselé du comune seal dount la une partie de lendenture demurera en le Hwch de la comune pur la dite chose tesmoigner, et la seconde partie de lendenture demurera en les mayns de les executours, et la tierce partie de lendenture en les mayns de eux qount les dits enfans en garde. Et en cas qe celui qest plus procheyn du sank ne voile pursure pur les enfans davoir la garde et de respondre com de sus est dit, les jurés, en mayntenonce de la franchise, les dits enfans lour chatteux lour teres et lour tenements delivreront à un autre bon et leal home de la vile, par mesme la securité susdite. Et donk soit il quest plus procheyn de sank de la dite garde, pour totes jours forclos par cause de sa nounsute ou par cause de ses non suffisant plegges.

on the same security as above said ; and, thereupon, let him who is the nearest of blood be foreclosed of the said ward for ever, by reason of his nonsuit, or by reason of his insufficient pledges.

13. New bailiff

Item.—It is used that, at what time there shall be no bailiff in the town, the Archbishop of Canterbury shall send a bailiff, whomsoever he will, with a commission sealed with his great seal, together with a letter of intendance to the jurats of the town, and the said commission and letter shall be read in full court, assembled by the common horn ; and with that the bailiff, in the said court, shall make an oath to the commonalty, dictated by one of the jurats, in this form :—“ I, N., bailiff, assigned by my lord the archbishop, in this port, shall maintain the franchise, and the usages of this port, and shall make lawful attachments and executions, according to the award and judgments of you barons ;” and otherwise he shall not be received. And if the said bailiff bear a commission sealed with any other seal than the great seal, he shall not be received ; and also, if he bring not a letter of intendance he shall not be received ; and, when a vacancy happens, our warden of the five ports shall send a bailiff with a commission and letter of intendance, sealed with the seal of office, and the said bailiff shall be sworn, and his commission and letter of intendance read, in full court, as is before said ; and be it known that at what time the said bailiff is sworn, he shall take a sergeant, one for whom he will answer, if need be, who shall be sworn, as is before said.

14. Of execution by the bailiff, and the penalty.

Item.—It is used, that if the bailiff make any other execution than what the barons have adjudged, or against the usages of the town, which is against his oath made to the commonalty on the day of his reception, let him be distrained by the jurats until he shall have paid to the commonalty £10 sterling ; and if there be not whereof he may be distrained within the franchise to the value of £10, let them be levied by our warden as the charter of our lord the king grants to all the barons of the ports, in these words—“ Et prohibemus ne quis eos injustè disturbet neque mer-

13. Novel bailif.

Item.—Use est qe a qele heure qil ne soit ascun bailif deyns la vile, le Erceveske de Canterbury mandera un bailif, li qil veudra ove comission aselé de son grant seal, ensemblement ove une letre dentendence à les jurés de la vile, et les dits comission et letre en pleyn court asemlé par le comune corn serount lus, et entre ceo en la dite court le bailif fera un serment à la comune chargé par un de les jurés en ceste fourmé. “Moi N. bailif assigné par mon seigneur lerceveske en cel port mayntenera la franchise et les usages de ceo port et leal attachements et executions fera solom les agard et ingements de vous barons,” et autrement ne deit il estre receu. Et si le dit bailif porte comission aselé dautre seal qe del grant seal ne deit il estre receu. Et auxi si il ne porte letre dentendence ne deit il estre receu. Et qant vacacion soit notre gardeyn de V. ports mandera un bailif od un comission et letre dentendence aselé de seal de office et deit le dit bailif estre juré, et ses comission et letre dentendence lus en pleyn court com devant est dit. Et fait à savoir qe a qele heure que le dit bailif est juré il prendra un serjant tiel pur ki il vuet respondre si cas avyenge, li qil sera juré com devant est dit.

14. De execucion de bailif od la paine.

Item.—Use est qe si le bailif face autre execucion qe les baronsount ajugé ou encountre les usages de la vile qest encountre son serment fait à la comune, le jour de sa receite, soit destreynt par les jurés tank il avera païé à la comune x li. desterling, et si nest de kai estre destreynt deyns la franchise à la value de x li, soient ils levés par notre gardeyn com la chartre de notre Seigneur le Roy grante à tots barons des ports purparle ency—“Et prohibemus nequis eos injustè disturbet neque mercatum eorum super forisfacturam x li.” Et auxi faire gré à lui sur ki il fet la tort execucion.

catum eorum, super forisfacturam x li." And also, he shall make satisfaction to him upon whom he made the wrongful execution.

15.—A man may make seizure in his house.

Item.—It is used that each man may make seizure in his house for his rent or farm withheld, and retain the distress until he be paid ; but he shall not carry the distress out of the franchise, and if he do so, let him be attached at the suit of the party, and put in prison until he shall have made satisfaction to the commonalty for the trespass done to the franchise, and him against whom he hath trespassed.

16.—Strangers in a suspicious place.

Item.—It is used that if a strange man dwell in the town in a suspicious place, the jurats and the bailiff shall demand of his host if he will engage that this suspicious person shall bear himself as a lawful man ; and if he grant this, then let his residence be allowed, or otherwise let him leave the town in three days. And, in case that this suspicious person say that he is a man of good fame, and of good condition, let him have a reasonable day to get from his country a letter of good conversation under an authentic seal, or under twelve seals of the most responsible men of the town from whence he is ; and then let him dwell in the town as a man of good fame and of good condition, and otherwise not.

17.—Of pledge given.

Item.—It is used, that if a pledge be given to a free man or a dweller in the town, to be redeemed at a certain day, and nothing be done ; he that hath the pledge in keeping after the said day is passed, shall come into court before the bailiff and barons, and shall demand the award of the court as to what he shall do with such a pledge, which he hath in his keeping, the which ought to have been redeemed at a day that is past. The barons shall give as their award, that he cause the party to be warned (at his cost who gave the pledge), that he come within his eight days to redeem his pledge, or it will be brought into full court before the said bailiff and barons, and appraised by —, and put up to sale ; and, if he come not within the said day, or at the said day, to redeem his pledge, at the said day let the pledge be brought

15. Home puet fere arest en sa meson.

Item.—Use est qe chescun home puet faire arest en sa meson pur sa rente ou ferme detenue, et retener la destresse tankil soit parpaiés, mes il ne menera pas la destresse hors de la franchise, et si il face, soit attaché al sute de partie, et mys à prison tankil avera fait gré à la comune pur le trespas fait vers la franchise et celui à kíl ath trespacé.

16. Estrange en leu suspicionus.

Item.—Use est qe si home estrange demurge en la vile en leu susspecionus, les jurés od le bailif demanderont son oste, si il le voile enperere que celui susspecionus se portera com lews home ; et sil ce grante soit sufferte sa demure ou autrement voide il la vile deynz iij jours. Et en cas qe celui suspencionus die qil est home de bone fame et de bone condicion, ait il jour resonable à qere de son pais letre de bone conversacion south seal autentyk ou south xii seals de les plus vailous de la vile dount il est ; et donk demurge en vile com home de bone fame et de bone condicion et autrement nyent.

17. De gage mys.

Item.—Use est qe si gage soit mys à franch home ou à receant deynz la vile daqiter à certain jour et riens nest fait, il qath le gage en garde, après le dit jour pasé, vendra en court devant bailif et barons, et demandera agard de court kai il fyra od une tiel gage qil ath en sa garde, la quele devereit aver esté aquités à jour qe pasé est. Les barons dorrent pur lour agard quil face garner la partie à ses custages que mist le dit gage, quil vienge par entre ses viij iours daquiter son gage, ou il sera amené en pleyn court devant le dit bailif et barons et prise par porteis¹ et

¹ We have not been able to find a satisfactory translation for the word *porteis*. In the English version of the Romney Customal, given in Lyon's *History of Dover Castle*, the word which should correspond to this is left out. In old French, *porteis*, according to Roquefort, means *portatif*, portable ; whence came the word *porteous*, *portowis*, *portuis*, *portas*, or *porthose*—an old term for the priest's breviary, or portable prayer-book. In Scotland, the same word was

before the bailiff and barons in full court, and then appraised by —, and the defendant shall have the whole day to redeem his pledge; and, in case that he come not at the said day, let it be delivered to the party plaintiff for his debt. And, if the price of the said pledge amounts to more than the debt due to him, let the plaintiff find pledges to the bailiff and barons to cause the surplus of the price to be delivered to the defendant at whatsoever time he chooses to claim it, and in that case no amercement lies.

18. Recognizance in Court.

Item.—It is used, that if A. de B. come into court before the bailiff and barons, and acknowledges that he is bound to C. de F. in £10, more or less, to be paid on a certain day, or to keep such a covenant, or whatsoever kind of recognizance it may be, the court shall cause the recognizance to be entered in their rolls, he paying the clerk for his trouble. And, albeit that the said A. de B. at another time wishes to deny it, the said recognizance shall be held against him. And, if he be a stranger who makes such a recognizance in the court, and hath not wherewith to make satisfaction in the town, the jurats, at the suit of the party, shall write to whomsoever is bailiff, or some good man of the town or city in which he resides, or where he is justiceable, and shall attest the said recognizance.

19. No fealty in the town.

Item.—It is used, that no fealty, relief, nor other suit, be made to any lord of fee for the lands and tenements which are within the franchise; but there shall be paid only a rent-sock at the terms when the same is due.

applied to "the list of the persons indicted to appear before the Justiciary Airc, given by the justice clerk to the coroner, that he might attach them, in order to their appearance." (Jamieson—*Scottish Dictionary*, s. v. *Porteous*; and see also the Supplement to that work.) *Porteous*, therefore, in its most general sense, seems to be an abbreviated roll, list, or index, taking its name from its portable character. Does *portais*, in our Customal, mean a list of prices—what we should at the present day call a "Price Current?"

mise à vente ; et sil ne vienge par entre le dit jour, ou à le dit jour son gage daquiter, soit à dit jour le gage amené devant bailif et barons en pleyn court, et ilak par porteis prise, et le defendant avera tote jour son gage daquiter ; et en cas qil ne vienge à dit jour soit deliveré al partie plentif pur sa dette. Et si le pris de dit gage amounte outre la dette à lui due, trove le plentif plegges as bailif et barons à fere delivère de le surplus de pris à le defendant à quele heure qil ceo voile pursure. Et en ceo caas ne gist nule amerciement.

18. Reconusance en court.

Item.—Use est que si A. de B. vienge en court devant bailif et barons et reconuse quil est tenu à C. de F. en x l. plus ou meyns à paier à certeyn jour, ou à teneer un tiel covenant ou quel manere reconysance quil soit, la court fera entrer en lour roles la reconusance paiont à le clerk soun travail. Et tut seit que le dit A. de B. autrefoitz le voit dedire, la dite reconysance lui sera encountre. Et si il soit home estrange que face tiel reconysance en la court, et nath per kay estere justifié en la vile, les jurés à la sute de partie deyvent escrire à kiconque bailif ou bone gent de la vile ou cité quil est demurant, ou justizable, et tesmoigner la dite reconysance.

19. Nul féauté en ville.

Item.—Use est que nule féauté, rélef, ne autre sute soit fait à nul seigneur de fée pur les teres et tenemens que sount deyns la franchise ; mes paier tant soulement rente sek à tearmes dues à eux.

[To be Continued.]

ART. IV.—TRIAL BY JURY.

1. *The Dark Side of Trial by Jury.* By JOSEPH BROWN, Esq., of the Middle Temple. London: Maxwell, 1859.
2. *Unanimity in Trial by Jury Defended.* By G. ROCHFORD CLARKE, Esq., of the Inner Temple. London: Stevens and Norton, 1859.

“LET us, then, magnify trial by jury! No man can say too much in its favour!” Such is the gushing and enthusiastic exclamation of Mr. Rochfort Clarke. “I arraign trial by jury at the bar of public opinion. I accuse it of incapacity, of ignorance, of partiality, of cumbersomeness, of barbarism.” So writes Mr. Joseph Brown, at page seven of his pamphlet. Now each of these gentlemen practises at the common law bar—each has had long experience as a special pleader, and they both belong to the same circuit. They have had, therefore, and still enjoy, similar opportunities of forming a deliberate and careful judgment concerning the tribunal, the merits of which they have discussed in the pamphlets above mentioned. The result is, one learned lawyer pronounces an unmeasured eulogy on it in all its aspects and relations; the other condemns it absolutely as a monstrous folly, and a mischievous relic of barbarism.

When, of two intelligent, experienced, and honest men, the one can see nothing but good in an institution with which they are both familiar, and the other nothing but evil, the phenomenon is worth observing for its own sake. It serves, moreover, to illustrate the general character of that class of conflicts of opinion which concern social institutions, and on which the weight of authority and dogma is always brought to bear, and sometimes assumed to be conclusive.

The questions relating to the tribunal of trial by jury are about to undergo, as it seems to us, the process now termed “ventilation;” and there will be exhibited, therefore, to the

public the spectacle of a certain number of learned (and still more of unlearned) men supporting opposite sides, drawing adverse conclusions from the same premises, or discarding one class of facts whilst they exaggerate the importance of others ; and the discussion will naturally excite the usual amount of prejudice and bias on the one side, and temerity and experimental essay on the other. The excuse for this treatment of political and social topics, when under public discussion, appears to be that, in point of fact, no step in life, and no measure relating to human affairs, can be taken to which some objection cannot be raised, or the possibility of evil consequences ensuing not be foreseen. Rash innovation, again, produces persistent obstinacy ; a bad reason for a good measure generates indifferent arguments for maintaining an imperfect system. Moreover, the logical weighing of advantages and disadvantages, the impartial watching of the balance of reason, even when self-interest does not come into play, is the result of an uncommon exercise of the rarest of all faculties—a sound judgment. As a general rule, differences of opinion create parties ; and when once men have become partisans, persuasion is of course out of the question. Invective takes the place of reason—stubbornness is resorted to as a defence—blindness, hardness of heart, and all uncharitableness, flourish ; and the partisan then becomes a slave to a dogma, and a mere repetition machine of routine plausibilities. If the dispute on the jury system proceeds in a normal fashion, we believe Mr. G. Rochfort Clarke will be found soon prepared to die happy, upon his being convicted of a capital crime by a jury of twelve men ; whilst Mr. Joseph Brown would surrender, in the pious ecstasy of martyrdom, the bar, and all its present profits and promises for the future, on the condition of an educated, trained, and model bench of *judices* sentencing him to penal servitude for the term of his natural life. The disciples also of those excellent lawyers (independently of being their juniors, and willing to undertake the professional labours which would devolve upon the rest of the profession if the criminal law were put in force as above

suggested) would doubtless approve of such self-sacrificing magnanimity of the great leaders in the jury controversy, if not called upon to share to the full extent in their hypothetical fate.

We shall endeavour to put the subject on the real footing on which it seems to us it should be discussed. It is of no use merely to rail at juries—to point out that the present system produces frequent miscarriage of justice; nor, on the other hand, does it avail to reply that trained and skilled judges have been repeatedly known to take erroneous views of matters of fact, as well as to propound much false doctrine in law.

If any one thinks that he cannot laud and “magnify” the institution of the jury too much, because it is absolutely perfect, we must take leave at once to differ from him; first, because, as a matter of fact, no tribunal ever has been or can be perfect; and next, because general experience contradicts his declaration. The question which alone ought to be before us is this:—Is trial by jury, as now instituted, the best practicable mode of eliciting the truth, when disputed by litigants in Great Britain and Ireland? And this inquiry may be prosecuted both by induction and deduction.

They who attack the institution urge, that *a priori* to pick up casually twelve men not accustomed to weigh evidence, nor to continuous thought in any way, and to call upon them to decide upon disputed facts or strange subjects, especially when the inquiry is accompanied with the drawbacks of technical difficulties, and encumbered with professional artifices, is simply absurd. It is assuming the preposterous proposition, that a common jury, uneducated to the duty, possesses by intuition “the faculty of hearing without being deluded by sophistry and eloquence, of catching and connecting, as it flies, the broken and disjointed evidence of numerous and contradictory witnesses; of selecting what is material and rejecting what is irrelevant; of sifting the wheat from the chaff, the substantial from the seeming, and extracting the kernel of truth from the misshapen husk of errors in which it is enveloped.”—(*Dark Side of Trial by Jury*, p. 9.) They further argue that, in point of subtlety and acuteness, the

jury is not on a level with the advocate, that professional sophistication and appeals to common or special prejudices, by his refined art and practised acuteness, are means not calculated to secure the ends of justice.

They allege that there is no responsibility felt when the onus of finding a verdict is divided among twelve men, who, extracted casually for the first time from a numerous public, are virtually anonymous, and are silently reabsorbed amongst the multitude. In the olden days the writ of *Attincta* lay against a jury for giving a false or perverse verdict, and grievous were the penalties attached to conviction of this crime—the liberty, property, and all legal rights of the false jurymen were forfeited for ever; but this contrivance for preventing or punishing perjury having been long obsolete, and being now abolished, each member, with his nominal one-twelfth of responsibility to bear, is practically free; and when the foreman declares (as one did lately in the sheriff's court) that they found "magnanimously" for the plaintiff—it may be inferred that such is the verdict of *some* at least out of the twelve, but also that some have taken the responsibility of saying so, and the rest of allowing them so to say.

But, coming to the arguments founded on experience, we find the absurdities of opinion, and foolish and ignorant verdicts, insisted on. So, too, the scandals of the jury-room; the tossing up, balancing a poker, drawing lots, compromising differences, are all pointed out as significant facts. The frequency of new trials, moreover, and the general uncertainty of verdicts, are very striking circumstances in the history of our jurisprudence.

Again, observes Mr. Amos,¹ "A jury gives no reason for its decision; and persons who casually, or upon inquiry, have become acquainted with the grounds on which a jury, or one or more jurors, have decided a case, will have often found that they were influenced by some reasons which totally escaped both the judge and counsel; and which, if they had been stated in court, could have easily been shown to have been founded on ignorance.

¹ In an able pamphlet which this learned lawyer and accomplished man published nine years ago, entitled "A Lecture on County Courts."

of the rules of evidence, or some mistake of law or of fact, generally the former. Thus, clandestineness in judicial deliberations, and concealment of the grounds for decisions affecting life, liberty, character, and property, make an inquest of twelve men bear a strong affinity to the celebrated Council of Ten. They occasion, moreover, a peculiar species of uncertainty in the verdicts of juries which I do not recollect to have seen noticed by our law-writers. Suppose that a plaintiff rests his claim upon three distinct grounds; say the action is for the breach of the warranty of a horse, and the plaintiff contends that the horse has three faults—is spavined, broken-winded, and glandered. Four of the jury believe in the glanders, eight disbelieve; and the like as to the broken-wind and the spavin. Under these circumstances, if the question be proposed generally to a jury, ‘Do you find for the plaintiff or for the defendant?’ They would find an unanimous verdict for the plaintiff, though they would have negatived by a large majority every ground upon which that verdict was claimed; but if the jury were asked their decision separately upon the three breaches of warranty, the plaintiff would not be entitled to a verdict. A similar result, and one which is more difficult to be guarded against, is often obtained when a single ground of action is supported by distinct heads, or pieces of testimony, concerning the credibility of which respectively the jurymen differ in opinion. Thus, suppose a criminal charge, which rests entirely on the evidence of an accomplice and that of a confession, and six jurymen believe the accomplice, but do not give credit to the confession; while the other six rely on the confession, but repudiate the evidence of the accomplice, the result is an unanimous verdict of ‘*guilty!*’” The above learned writer may well ask whether this vicious accumulation of minorities may not in many cases, by simulating the character of majorities, have dealt much injustice!

To these enumerated objections we may add another, which, probably, delicacy on the part of Mr. Joseph Brown has prevented him from expressing, but which we have no hesitation in pressing upon the attention of the legal profession. We refer to the

effect the jury system has on the production and maintenance of the mere *Nisi Prius* advocates—that class of men we mean, who, destitute of law, and perhaps, in addition, shallow in understanding, vulgar and claptrap in address and language, but practised in the congenial task of talking *down* to a common jury, and with a natural capacity for blustering, bullying, browbeating, humbugging, and the use of those cunning arts calculated to mislead an ignorant body of men in a position novel to them; but which are threadbare and transparent to those who, like the judge and counsel, are condemned now to be perpetually witnessing these contemptible “tricks of the trade.” Degeneration is a process which quickly ensues among men of this order, who thus bring contempt upon the profession of law. The inferior specimens of those who thus thrive by the common jury system, would never hold another brief if a competent audience were to be addressed. We have heard that one of this latter division of the class in question has one story, which he invariably introduces to every fresh jury at his sessions and elsewhere, somewhat in this way:—Having tried to mis-state a piece of evidence, first in one way and then in another, and being as often checked by the counsel on the other side, this accomplished advocate invariably exclaimed, in his pure English and accomplished style, “Why, gennelmen! my learned friend, gennelmen, is like the soldier, gennelmen—he don’t like it any way. The soldier, gennelmen, you know, when he was being flogged, you know, kept complaining he was ’it too ’igh or too low, you know—there was no pleasing him, gennelmen, you know. My learned friend is like the soldier, gennelmen,” &c. Doubtless it was to this counsel’s arguments on one occasion, *in banc*, that his pert junior said he wished to add nothing but the H’s. In the continual succession of fresh juries the stalest and poorest of jokes, the most superficial of arguments, and despicable appeals to prejudice, pass muster. There are, as we have just observed, ranks and degrees among the *Nisi Prius* lawyers, fostered by the jury system. Some, it is true, endowed with natural eloquence, are capable of better things, and can occasionally rise superior to the bad habits engen-

dered by their successes in a limited and ignoble field of operations. Rapidity in apprehending facts, ingenuity in unfolding them, skill in evading legal questions, and in cloaking personal legal deficiencies, are valuable qualities, and will account for such success as they bring ; and these qualities may be, and doubtless are, occasionally conjoined with others, which together form the accomplished leading advocate. On the whole, however, forensic talent is debased by the necessity imposed on counsel of gaining their verdicts through the understandings and prejudices of imperfectly educated men, and these generally of a low intellectual standard.

There are yet other charges, founded on experience, which are brought against trial by jury, to which we must advert :—"No insurer resisting a life policy—no great company resisting a claim for an accident—no lawyer or doctor suing for his bill—no gentleman contesting the charges of a tradesman—no landlord suing for a forfeiture—no person who has rendered himself by any means unpopular, can safely depend on the impartiality of a jury. The fact is familiar to every lawyer, and calculated on beforehand. Nay, even a merchant of London suing a trader of a country town, is not safe in a disputed case with a jury of that town. In parts of Wales, a Welsh jury can hardly be got to do justice to an Englishman against a Welshman."¹

What are the chances of a true verdict, it is again asked, "when national or religious prejudices envelope the case?" How would the case of *Achilli v. Newman*, have resulted if the jury had been constituted of Roman Catholics? In Ireland proved assassins and conspirators are acquitted, and a verdict of wilful murder brought in against Lord John Russell, because a poor man had starved in the time of famine! Railway companies, and other wealthy defendants, have verdicts against them in defiance of all evidence. Compassion for the sufferer, and his right to compensation are often-times confused, and flagrant injustice is committed. Besides lawyers, apothecaries,

¹ This fact, when noticed by that learned and able judge, B. Bramwell, was challenged on a recent occasion, and indignation thereat was affected in the House of Commons ; but it is true, and the judge was right to say so.—(Ed.)

bill-discounters, sheriffs' officers, and others, according to Mr. Brown, have very little prospect of getting a verdict; and generally before a common jury, no gentleman should attempt to resist a tradesman's bill, however exorbitant, nor any sane but injured inhabitant of a county sue a justice of the peace thereof, for acts of tyranny or illegality, before a special jury.

No remark is more common among lawyers, than "In this case we must have a special, or common jury," as the case may be; the object being to secure a tribunal, the known sympathies or prejudices of which may be favourable to the success of the client whose interests are being considered.

So far as we can collect them the above are the more common arguments brought against trial by jury. For that of the *inconvenience* to the jurors we do not regard as of great cogency, the present improper mode of summoning them, detaining and maltreating those in waiting, being matters relating to detail, and do not touch principles. In the clever lecture by Mr. Amos, already referred to, the reader will find some excellent and pertinent remarks upon the relation of the county courts to the trial by jury, as well as upon the unanimity of juries, which the author has so discussed as to have anticipated much which has since been said on the subject.

Let us now listen to the advocates for retaining trial by jury. They advance many well-known and substantial reasons on its behalf. Indeed, they seem to prove too much; for in the greater number of appeals to the law—civil or criminal—the intervention of a jury is already dispensed with. In the Courts of Chancery, Admiralty, Probate, Bankruptcy, and Insolvency, questions of fact as well as of law are left to the Bench. In the County Courts juries are the exceptions; in the Divorce Court their employment is in the discretion of the judge. In the Superior Common-Law Courts at Westminster, there is a large proportion of cases withdrawn from the jury-box, and submitted to professional reference or that of the masters, and occasionally that of the judges. Not unfrequently the counsel or solicitors on either side "arrange" the dispute rather than trust

it to a jury, thus constituting themselves the arbitrators. So also many causes are turned into special cases. In the result, only a small part of our vast civil litigation is submitted to the adjudication of juries. In criminal cases the returns show that the magistracy disposes of by far the greater number of delinquents. Hence it is obvious that they who "magnify" with Mr. Clarke trial by jury, ought also to strive to "multiply" its application in many more instances than the present state of the law and its practice admits of. As their intention does not travel to this extent, it is a plain admission that the tribunal is not a suitable or necessary one in a large proportion of the litigation in this kingdom.

The grounds for maintaining the present jury system in its present state—we cannot call it integrity—appear to us to be as follows :—

1. It has been handed down to us by our forefathers.

2. There is great difficulty in finding another which we *know* would work so well, and be as little mischievous as the present. The habitual and constant exercise of the office of weighing contradictory evidence, and balancing opposing probabilities, would exhaust the mind of a single judge bound to decide on facts as well as law, and listening to the rapid succession of causes tried at *Nisi Prius*. "Although it may sound paradoxical, it is true that the habitual and constant exercise of such an office tends to unfit a man for its discharge. Every one has a mode of drawing inferences in some degree peculiar to himself. He has certain theories with respect to the motives that influence conduct. Some are of a suspicious nature, and prone to deduce unfavourable conclusions from slight circumstances. Others again err in the opposite extreme. But each is glad to resort to some general rule by which, in cases of doubt and difficulty, he may be guided. And this is apt to tyrannize over the mind when frequent opportunity is given for applying it. But in the ever-varying transactions of human life, amidst the realities stranger than fictions that occur, where the springs of action are often so different from what they seem, it is very

unsafe to generalize, and assume that men will act according to a theory of conduct which exists in the mind of the judge."

—(*Forsyth*, pp. 443, 444.)

3. In political prosecutions the jury has stood, and is likely to stand, between the government and its intended victims; and if the institution be curtailed in civil suits, the thin end of the wedge has been inserted, and thus the protection of the subject from the law and its officers in future history will soon be lost.

4. A jury taken from the general public is likely to be entirely impartial. By this, we presume, is meant that twelve men, casually brought together out of a multitude, are not likely to have any *personal* relations with, or predilections for the plaintiff or defendant, and it has special reference to a densely populated district, and not to some localities, as in Wales, Scotland, and Ireland, where inhabitants are sparse, and clanship is prevalent. Nevertheless cases do occur where personal sinister influences do affect justice, as in the case of the pertinacious juror who stood out against his eleven brethren, notwithstanding palpable proofs of guilt, in a capital case. The majority, thinking that there must be some secret and powerful grounds for their colleague's adherence to his opinion, acquiesced therein, and found the verdict of Not Guilty. They unfortunately did not know that the prisoner at the bar was the sole surviving life in a copyhold estate in which the virtuous and steadfast juror—*justus et tenax*—was interested.

5. A body so selected will give a fair average representation of the view which the public in general would take of the facts of the case when presented to them at large, and therefore will be perfectly satisfactory to the judgment of the community.

6. The "common-sense" view of a case (which is assumed to be that especially closely allied to truth) will be probably taken by twelve ordinary minds when an opportunity is given them, as now for discussion, and when those doubts and difficulties which arise may be compared and resolved in conclave.

7. That merchants, tradesmen, and others engaged in the

business of life, understand better than others transactions in the world, and especially those connected with matters about which litigation usually arises.

There is, however, another class of reasons not affecting the aptitude of the jury system for eliciting truth, but advanced on other grounds. Thus, it is said :—

8. The concurrence of the people in the administration of the law through the medium of the jury, greatly increases the popular respect for the law and judge. "In deciding upon facts, opinions will necessarily vary, and judges, like other men, are liable to be mistaken in estimating the effect of evidence. Every one thinks himself competent to express an opinion upon a mere question of fact, and would be apt to comment freely upon the decision of a judge, which on such a question happened to be at variance with his own. It is easy to conceive cases where much odium would be incurred if, in the opinion of the public, the judge miscarried in a matter which the public thought itself as well able to determine as the judge. From this kind of attack the judge is now shielded by the intervention of the jury. He merely expounds the law, and declares its sentence; and in the performance of this duty, if he does not always escape criticism, he very seldom can incur censure. So that De Tocqueville is strictly right when he says—'*Le jury qui semble diminuer les droits de la magistrature, fonde réellement son empire: et il n'y a pas de pays où les juges soient aussi puissans que ceux où le peuple entre en partage de leurs privilèges.*'"—(*Forsyth*, p. 444.)

9. That the jury-box is "where men are best instructed in the law." They learn to administer justice by administering it. "Even the people that stand by are receiving useful lessons," says Mr. Rochfort Clarke, "and all owing to this popular form of trial." He remarks, "The people take the deepest interest in our trials and arguments. They love their queen and country—they are peaceable and loyal—they like to listen to trial by jury;" and the learned author further deposes to their enjoying his and other learned counsels' "wit and repartee," and

to the flattering attention given to their most astute and learned arguments, "trying to understand even when they fail;" and finally, they pay "a grave attention to the summing up by the judge, and await, often with anxiety, the verdict of the jury;" and he declares, complimenting too highly the judges and counsel, as well as the tribunal which he is upholding, that this "is more *ennobling* than a pantomime, and quite as amusing!" We have inserted this argument simply because we have found it in Mr. Clarke's pamphlet; but as *we* never have been *ennobled* by a pantomime, and very seldom amused by listening to and arguing demurrers, we feel a difficulty in dealing with the statement. We have, however, in deference to Mr. Clarke's experience at pantomimes entered on the inquiry with some youthful friends, and we have failed to elicit the fact, that even *their* characters have been augmented in dignity, or their notions ennobled by the Christmas relaxation, which we further understand is abhorred by the really devout, although frequently indulged in by the frivolous, and connived at by the lukewarm. We have indeed arrived at the conclusion, upon universal concurrence of the testimony of those youthful witnesses, that they enjoyed a pantomime because it was "such fun!" This, no doubt, is the explanation of the enjoyment by the audience on some trials by the aid of a jury; but the plaintiff, or defendant, or both, have frequently appeared to us not to share in the general mirth, so dexterously aroused by the low comedy of the actors, nor did they appreciate the excellent opportunity they were affording for the legal instruction of the jury, and the elevation of the public mind. The Westminster and Guildhall pantomimes are, we will venture to suggest, too expensive, and played too exclusively at the cost of others to justify their continuance on this ground.

11. The intervention of a jury is the safeguard against property, liberty, and rights being abused by unjust and improperly appointed judges; in other words, it is a safeguard against judicial corruption, and forms, what Jeremy Bentham half a century ago called a *check* on judges.

12. That the social uses of the jury are great, in bringing men to deliberate and act together for mutual and general purposes, giving them an interest in the administration of the laws, and knowledge of its operation, its advantages and defects.

13. This trial by jury is thoroughly English. Many of the above propositions and arguments, which we have endeavoured to collect from those who have considered the subject, need not here be dwelt upon. Many of our readers are familiar with the subject in its practical form, and all are acquainted with certain of the defects in the institution, and certain of the benefits derived from it. Nevertheless, members of the legal profession are doomed to hear frequent repetitions of commonplace fallacies on this topic; and this is a process which has more or less a deleterious effect upon most minds. Unless one actively contests the continual pressure of the multitudinous voice, and reiterated assertions which find free expression on a popular subject, one runs the danger of either passively acquiescing in, or at least being supposed to assent to, their validity. Besides which, many have necessarily had only the opportunity of taking a partial view, and profiting by a limited and local experience. One counsel may, from the beginning of his practice, have been lucky enough to have seen chiefly the working of special juries in the city of London—the best tribunal, without doubt, for deciding on mercantile cases, where the customs of merchants, the natural operation of business, and mixed law and fact, are in dispute. Another man may have had his professional career centred at some sessions presided over by an incompetent, weak, and prejudiced chairman, and who would endeavour to convict every prisoner indicted for sheep-stealing if he were suspected likewise of being a poacher. In this case, according as juries were wont to be swayed by the bench, or acted in defiance of the chairman's directions, would the practitioner found his opinion on their utility. He would naturally laud the institution which protected the prisoners from class prejudice on the one hand; while on the other, if it had been obvious that such was not the result, but that the judge generally induced his jury to incorporate his

prejudices into *their* verdict, thus relieving him of its responsibility, an opinion would have been naturally formed that juries were useless or mischievous. A third barrister may have been more accustomed to see, in one of not a few districts in our country, justice being continually prostrated by the stupidity or prejudice of the jurors, or their general prepossession in favour of the ranting of the prisoner's counsel, or by their natural sympathy with rogues in general. Here honest indignation will lead the observers to denounce the jury system as a curse to the land. We will therefore venture to point out generally what seems to us to be the real value of the points above raised in the discussion.

The *first* ground we noted, which might be taken *a priori* against the jury system, was, that it was theoretically absurd. The *last* reason referred to in favour of the form of trial, was, that it was thoroughly *English*. But these two propositions are by no means inconsistent. Our political constitution, and our social and legal institutions, are not the creation of the theorist, who, from metaphysical considerations, and on psychological grounds, has constructed what *ought* to suit the inhabitants. In other countries, perhaps the boot is first made, and the public's feet are subsequently thrust in. In England the boot is endeavoured to be made to fit the foot, and presents, therefore, the ungainly appearance of much patching, stretching, shrinking, and occasionally bursting out. Apparent anomalies, or theoretical absurdities, are therefore by no means, in these matters, un-English in character.

In this case, the fact that the jury system is thoroughly English really has a meaning. It signifies that the institution has grown to be what it is. If a recent statute had enacted that causes should for the first time and henceforth be tried before twelve men, collected as now, it would appear *à priori* (nay, it would be) a very absurd law. It is because, centuries ago, there was an institution different in many particulars, but which has developed into the present jury system, that it is thoroughly *English*, and one for which there is much real national affection. The original principles upon which juries were summoned were,

that "every trial should be out of such place, which by presumption of law can have the best and most certain knowledge of the fact," and that the jurors should therefore come into the box "prejudiced," and ready to supply evidence rather than receive it. The jurors were in the nature of witnesses. The transition from this principle to that upon which the common jury system is now founded and approved, are so different that it might be deemed at first sight the result of violent revolution rather than natural development; but it is all the more natural for this very reason. There is, we all are aware, intrinsically a vast difference between the duties and the intention of juries during the last century and a half, and those of the preceding centuries. In 1679, Nathaniel Reading (7 State Trials), taking rather our modern view of the position and duties of a juror, desired when on his trial to challenge one Sir John Cutler, on the apparently rational ground that there was a close connection between him and the prosecutor. "I have," he urged, "seen him in company with Mr. Bedlow, mine accuser. I know that there is not a common intimacy and friendship between them;" upon which Sir Francis North, C. J., exclaims—"Do you challenge a jurymen because he is supposed to know something of the matter? For that reason the juries are culled from the neighbourhood, because they should not be wholly strangers to the fact. If you can show that he hath already given his verdict by his discourse, and that you are already condemned in his opinion, that *may be* some cause of challenge; but not that he hath discoursed with neighbours as others do. It may be he believes it, and may be he does not believe it, he is now to give his verdict upon what he hears upon oath."

[*Reading.*] "My lord, I am very glad to see Sir John Cutler here, for I did intend to have his evidence for me." To which remark the judge returned—"That you may have, though he be sworn."—(7 State Trials, 267.)

Such a dialogue as the above could not be heard, according to the present construction of juries, without shocking all notions of legal propriety. If, then, by the allegation of the jury system

being English, it is meant to defend it on the sentimental and antiquarian ground, that it has been handed down to us in its present form, and therefore we are bound to retain it, and transmit it to posterity, then the assertion is valueless. Our idea of a jury is that of twelve impartial men, who, independently of all extraneous information, are to decide on the facts brought before them in evidence. And this was what our ancestors' idea was *not*.

The jury has shifted its character and use. It was not what it is; and there is no valid reason why we should not, as our forefathers have done, review and modify its character and application to suits at law. The present inviolability should depend solely upon its present merits for the particular purposes of those who have now to appeal to the law for their protection and support. We know that we are warned to preserve great respect for posterity, as well as worship for our ancestry. It is indeed a difficult task to effect any reform, or remove any inconvenience which presses upon ourselves, because of these twofold and overwhelming obligations to our ancestors and our descendants. The embarrassments imposed by these considerations of the past and the future, involving equally the uncertainties of history and prophecy, make the duty of looking after our own generation particularly onerous.

We would by no means urge that we should sacrifice, either for ourselves or our descendants, the right to any constitutional privilege; but, without doing this, we may surely remove proved inconveniences to ourselves, which we daily feel, in the sure and perfect hope that our posterity will not be therefore powerless to abrogate what we hand down to them if they desire it, nor so unwise as not to perceive for themselves what is requisite for their welfare, without respect of our previous dealings. Every age, in fact, must legislate for itself.

We believe the supposed danger really pointed at by those who dread innovation in the practice of summoning juries to decide in civil cases, is that it will lead to like proceedings on criminal prosecutions, and that arbitrary governments will abuse a power

which they may then seize. In a debate in the last session on the Indictable Offence (Metropolitan District) Bill, which related to an alteration of the laws relating to grand juries, Lord Lyndhurst took the opportunity of addressing himself to the class of arguments we are now adverting to. He said :—

“In the first place, I would suggest to your lordships that when any measure is brought forward, changing the fundamental laws of the country, particularly the important laws relating to trial by jury, you ought not to consider only the present state of things, but that which may hereafter arise, and you ought to proceed with the greatest circumspection and caution. At present we are not at all aware of what arbitrary government means; we now pursue the directly opposite system. Prosecutions for political offences are never heard of; the administration of justice is mild in the extreme; and we have no grounds of complaint whatever on any of the points I have referred to. We may be perfectly satisfied with our present position; but, unfortunately, I have lived in times of a different character. I have seen the time when the government was carried on upon arbitrary and even tyrannical principles—when political prosecutions were of constant occurrence, and were conducted with extreme harshness, and punishments of great severity were inflicted for political offences. I have been myself, to a certain extent, not merely a witness of, but an actor in, those times. The growing prosperity of the country, producing a greater amount of content, has caused a change from the feelings that then prevailed; but, my lords, we must not so far delude ourselves as to suppose that such a state of things can never again arise. Violent political feelings may again be excited, and who can venture to say that a similar state of things may not again occur? At all events, let us not, acting under such a delusion, take any steps towards destroying the bars and fences the constitution has given against the exercise of arbitrary power.”

And, again, the noble lord urged, with respect to the particular measure then before the House, what may be said of any measure affecting an institution like that of juries :—

“It is harmless at the present moment, but will it always be harmless? It is our duty to provide against all contingencies, and not to suppose that the present harmony and the present smoothness of the government will always continue. Statesmen should look forward to contingencies of various kinds, to guard against them. Our ancestors guarded against them in the provisions to which I have referred.”

Now, all we will affirm on this matter is, that there is no possible reason for abandoning trial by jury in any criminal case, least of all in political prosecutions, *because* we do not demand its invariable aid as a necessity in an intricate patent case, or on the issues of fact invoked in various suits at common law. An over-sensibility to danger is in itself highly inconvenient; and it appears to us an absurd jealousy to suppose that there is any conspiracy against the constitutional right of an Englishman being fairly tried by his peers, or an attempt to favour arbitrary power, in advocating a more extended right for litigants to have their causes tried by a judge, if it be believed that this is the most satisfactory mode of proceeding.

Whether the present jury system be theoretically absurd or thoroughly English, is of far less moment than the question, Does it work so well that it cannot be modified with advantage, and in certain classes of cases be exchanged as a general rule for trial by judge? Will the advantage of having a skilled judge to adjudicate, be outweighed by the loss of publicity supposed to be incurred when the jury-box is not filled—and twelve honest men do not receive their first lesson in jurisprudence by seeing business done in court, and experimentalizing on the fortunes of the parties whose action is being tried before them? For be it remembered the inexperienced jurors do not, like students of medicine, practise first upon the dead subject, but may have the duty, on his first essay, of amputating a living suitor's character, or removing his purse to his opponent's pocket. Now, we would suggest that shorthand-writing, steam-printing, cheap and accurate reporting and publishing, to a great extent supply the absence of jurors. It was well for men to come together in former times to see and hear what was doing, for they not only furnished the *check* which juries afford over judges; but locomotion being imperfect, and intercourse limited, except between near neighbours, the necessity which was imposed on yeomen coming together, insured an audience interested in the matter, who, on going home, were the means of distributing authentic information to divers districts, as to the uses and terrors of the

law. Now, the public is kept informed of the proceedings in courts of law by a cheap press, and the "check" which public opinion exercises is thus put in full force.

There is a large class of causes which are usually said to be of "no interest to the public," arising out of contracts, &c., and depending on the particular value of certain evidence. But these, by general consent, might be better tried by the judge alone. In other cases, that influence which audience and reporting are supposed to produce, would be yielded in abundance in the common course of modern affairs, through the medium of general and professional newspapers. It cannot be denied, as it seems to us, that the intervention of a jury might be most useful as a check, where the law does not now admit of it, on the ground of inconvenience. We refer to petty sessions holden before certain county magistrates, whose ideas of responsibility would doubtless be much heightened by a knowledge that they were under the observation of a jury whose concurrence, moreover, was essential.

In the superior courts, an intelligent profession, an independent bar, the reporter's box, and a court of appeal, operate as a very powerful public opinion, far more than twelve select men, who are for the most part instructed and led to their verdict by the judicial judge, whilst they free him from the responsibility of giving it himself.

Closely connected with this portion of the discussion is the assertion, that the judges are more respected, and their impartiality more trusted, when the losing party has only the jury's stupidity and corruption to complain of. People are afraid of the press taking to criticise the judges; of seeing Sunday newspapers placarding "*Justice A.'s iniquitous verdict*," or "*Baron B. at his blunders again*," and the like. But constituted as the bench is now, when even party politics are made subordinate to personal fitness for promotion to the bench, there is no probability of such scurrility being attempted. We do not find judicial decisions on points of law (when the success or failure of an action turn thereon) provoke such intemperate remarks: nor in

those courts which we have already enumerated, where no jury is engaged, do we find these threatened consequences ensue. No doubt any judge is liable to the imputation of partiality; but if it be not founded in fact, the idle rumour of the day does no harm, and need not be dreaded. If we should do more substantial justice by substituting one tribunal for another, the public would, notwithstanding occasional grumbles, be better satisfied, and genuine contentment with legal institutions would be increased. Lord Mansfield was subjected at one time to like suspicion, and Bentham has a characteristic note in one of his essays on this subject. He says:—"I remember hearing partialities, and even the habit of partiality, imputed by many to Lord Mansfield. I cannot take upon me to say with what truth; partly by situation, partly by disposition exposed to party enmity, so he accordingly was to calumny. 'Lord Mansfield' (said his everlasting rival and adversary, Lord Camden, once)—'Lord Mansfield has a way of saying, It is a rule with me—an inviolable rule—never to hear a syllable said out of court about any cause that either is, or is in the smallest degree likely to come, before me.' 'Now I, for *my* part,' observed Lord Camden—'I could hear as many people as choose to talk to *me* about their causes; it would never make any the slightest impression upon me.' . . . Such was the anecdote whispered to me (Lord Camden himself at no great distance), by a noble friend of his, by whom I was bid to receive it as conclusive evidence of heroic purity. In the days of chivalry, when it happened to the knight and his princess to find himself *tête-à-tête* upon their travels, and the place of repose offered but one bed, a *drawn sword*, placed in a proper direction, sufficed to preserve whatever was proper to be preserved. This was in the days of yore, when pigs were swine, and so forth. In *these* degenerate days the security afforded by a *brick wall* would, in the minds of the censorious multitude, be apt to command more confidence." The reputations of Lord Mansfield and Lord Camden have survived such suspicion suggested against them; and with an

independent bar and the public press as checks, there is little fear of the bench degenerating, or losing its lofty character.

The probabilities are, that judges are not, nor would be swayed by class prejudices, like those referred to above, as now obstructing the administration of justice through juries; yet it is sometimes said that the substitution of judges for juries would be attended with this sad consequence—that the former would administer the law *strictly*, while the latter often do rough justice by wresting its course. It is actually thought advantageous that they should shut their eyes to the truth, and open their mouths to falsehood, lest the law of which they do not approve should be enforced, or lest it should be applied in an individual case where they consider it would work hardship. They therefore agree to do “a great right by doing a little wrong.” We are all familiar with the doctrine being professed by those who are opposed to capital punishment, and regard on religious and moral grounds the perjury of a juror as a lighter offence than his being instrumental in depriving a human being of life. This we must, however, hold as monstrous in morals, and pernicious in practice. If the law is bad in any particular, let it be amended; but to prevent its application by a system of perjury—excused under the term of doing rough justice—is disgraceful to a civilized country, and destructive to the integrity of those concerned in the administration of justice.

When one sees a sharp unscrupulous rogue employing the law as an engine of extortion, or using it as a cunningly devised means for enriching himself at the expense of the ignorant, unsuspecting, and innocent, one rejoices to see him frustrated in his object; but not if it is at the cost of a jury of twelve good men and true conspiring to commit perjury. Another point to be recollected is, that often what may have the appearance of hardship and cruelty (and is therefore endeavoured to be thus remedied by a corrupt verdict), might nevertheless, on full investigation, be held to be both legally and morally just and fair. The equitable powers of the judges at common law ought, doubtless, to be much enlarged in order to afford protection to those against

whom the law may be strained; and in those particulars where the law itself requires modification or restriction, these should be applied, instead of attempting a cure by the arbitrary infringement of the law. The same remark applies to another observation which is sometimes advanced in favour of the healthy action of juries on litigation; namely, that mean and dirty claims—but good in law—are often kept out of court from fear that indignant juries would reject them. It is a matter of every day's experience that juries, however they may be assured that to award and proportion damages with reference to costs, is improper, insist upon taking this matter into their consideration, and not unfrequently thereby produce injustice. Much better would it be if the power of ordering costs in any event should be left with the legal tribunal before which the cause is tried; but it would be very doubtful if it should ever be left in the hands of the jury.

It should not be forgotten that, after all, trial by jury is trial by *judge and jury*—that if you were to pick up twelve men, who, without the assistance of a judge, were called on to try causes, the system would be a ludicrous farce. The judge not only acts as moderator during the trial, but gives his version of the evidence, and directs a verdict more or less strongly, according to the habit of the judge, or as the nature of the case may require; and if the statement, that the habitual exercise of deciding on disputed facts unfits a man's mind for determining matters of fact be of any validity, then so far as an experienced judge exerts control over the verdict of juries, to that extent will his interference be mischievous. But we apprehend the most superstitious jury-worshipper would not desire to dispense with the aid of the judge. In point of fact, the habit of sifting testimony, and attaching the proper value to the various phenomena of evidence, does *not* unfit either judge or counsel for forensic duties. If this doctrine indeed were sound, then a jury should not be constituted of tradesmen who have *some* knowledge of life and experience of human veracity, but collected from the ignorance of Sunday schools, and the innocence of nunneries. A judge is surely not

rendered incapable by that which forms, according to the advocate of the jury system, the very essence of a juryman's excellence—a practical acquaintance with men and life. There is no doubt but that a judge may be crotchety and wrongheaded, may be addicted to special theories, and invent invariable, or misapply general rules for solving particular difficulties. But, on the other hand, no one is so likely to be made aware, and if possible be cured, of a tendency to such bad habits as the judge; first, in his professional career when at the bar, and even when elevated to the bench, by his having continually his opinions and views subjected to the canvassing and opposition of counsel, the consideration of his colleagues, and the revision of superior courts.

The division of the judicial office between judges and juries, although theoretically clearly enough defined, is practically often lost sight of. Mr. Amos has referred to the inscription on the medal, struck upon the occasion of the acquittal of Lilborne when prosecuted by Oliver Cromwell. "John Lilborne, saved by the power of the Lord and the integrity of his jury, who are judges of law as well as of fact," or, as the same truth has been expressed in the oft-quoted lines:—

"For Sir Philip well knows
That his innuendoes
Will serve him no longer in verse or in prose;
Since twelve honest men have decided the cause,
Who are judges of *Fact and judges of Laws.*"

And so long as juries have the power of overstepping the limits of their duties, they will do so—especially when the addresses of counsel appeal to their vanity and prejudices; and the warnings of the judge only excite their jealousy of his and the law's interference with their right divine to answer wrong.

The opportunity which trial by jury affords for "summing up," is practically its best feature, and the advantage here is to the judge himself; for indeed every day's experience shows that nothing elucidates facts, and tends to lead one to a just conclusion, so much as explaining to others the grounds, and expressing in words the reasons, which have conducted thereto. By this

means, moreover, if any misapprehension has arisen, it may be corrected, and the source of error and confusion be traced. But, even in the absence of a jury, a judge would accompany his verdict with his reasons in the form of summing up. There need be but little change in this respect. As a general rule, he is found to be the best judge who is best able to sum up in the clearest manner, and so to leave a case to the jury, that their verdict shall be simply the expression of the necessary inferences, astutely indicated by the bench. It would then follow that the judge who can sum up powerfully to a jury, could explain his own verdict without their presence. We view with very little veneration the jealousy affected in some quarters, of the judge trenching upon the functions of the jury. In almost every case where the latter repudiates the judicial opinion, they are giving a verdict either obviously perverse, or probably erroneous; the rare exceptions being, when the judge being by accident under an abnormal and false impression, to which all are occasionally liable, meets with an ordinarily obstinate or remarkably intelligent jury, by which his judgment is corrected.

The arguments founded on the social use of the jury, which heretofore has unquestionably been of great importance to the country, are those to which the advocates for retaining the tribunal in its present state had better adhere, although, as we have pointed out, they apply less strongly now than they did at an earlier period.

The most perfect administration of justice between man and man, and the strong confidence of the public in the justice of our tribunals, stand beyond all other social benefits, and should be purchased even by the sacrifice of those social advantages, however great, arising from men meeting together for the common purpose of aiding in the administration of justice. Unless, indeed, the *main* object of any machinery be effected in the best and most perfect manner, the ingenuity exhibited in construction, and the collateral merits of the machinery itself, will by no means justify its employment. The main object of legal tribunals

is the production of justice. Other social and political advantages are but collateral.

The political uses of the institution are admitted to be undeniably great. Juries have often stood between a tyrannical government and its hated victims. They have also, and this too in later times, protected miscreants who have been saved from the penalty due to their proved guilt, by confounding the guilt of cowardly assassination with the virtue of patriotism, and mistaking the rant and fustian of a vulgar speech for the defence, for the outburst of genuine oratory and real eloquence engaged in the cause of freedom. Nevertheless, the security and confidence which the right to trial by jury give to the subject are too great to be sacrificed.

The right to trial by jury we would maintain, therefore, both in criminal and civil causes. But, practically, in the latter we believe its employment should be (as in the county courts) the exception, and not the rule. If the law was amended by an enactment (as, indeed, was proposed many years since), that "all questions of fact in civil suits should be determined by the judge, unless either party shall require them to be determined by a jury," thus inverting the present order of choice existing in the procedure of the supreme courts, a large class of cases would fall naturally and properly to the decision of the judge, to the immense saving of public time and trouble. Such tribunal would of course be opposed by a few of the older *Nisi Prius* advocates, the level of whose power is that of the common jury, and some little prejudice would be felt at first.

There ought to be a fee attached to the summoning of a jury, each member of which ought to receive, as do the members of a special jury, a proper fee for their attendance. Such fee ought not to amount to a barrier in resorting to a jury, but should be a consideration. It is said the cost of a special jury is about twenty guineas (which is too high). That of a common jury should be, we would suggest, about one-third or one-fourth of this sum. There should be also a much larger admixture of the class whence special jurors are drawn with the common jurors—

perhaps not less than one-fourth of the former should be mingled with the latter.

Again, the granting of trial by jury should not be a matter of course. It should be by Rule, open to opposition by the other side, to be granted at the discretion of the court or judge, and the cost of summoning juries should be also made discretionary. The new system thus introduced would, we believe, work well; and the greater number of cases would be appropriately adjudicated on by the judge.

We are, in fine, inclined strongly to concur with Mr. Brown when he says—

“Let all ordinary cases be heard by a man of superior discernment and practised skill, whose natural powers have been sharpened by a life spent in forensic contests; who cannot be easily deceived by a witness, because he is conversant with every kind of testimony, nor by an advocate, because he has been an advocate himself; who is fit to hear, and to estimate at its true value, every species of evidence hitherto excluded, which may open an avenue to the truth; whose attention is not to be exhausted by the length, nor his comprehension distracted by the complexity, of the evidence: give the suitor, I say, a man with these qualities, who performs his functions under the public eye, and who is in no hurry to get away to his shop or his farm; whose very trade and business it is to weigh, investigate, and decide on questions of doubt and difficulty; in a word, let the facts be decided by the same experienced judges as the law, and the whole body of the law will feel renewed and invigorated by the change. A great part of its supposed uncertainty will vanish, new light will pour in from sources of evidence now shut up,¹ the scales of justice will be held with even hands, the heavy grievance of new trials will be vastly diminished, the suitor will obtain his rights with greater speed, economy, and certainty, and the criminal will no longer find refuge in the sophistry of counsel or the weakness of juries.”

Where we differ from Mr. Brown in the above forcible passage we have already attempted to show; but we are much mistaken if the general truth of his views are not growing to be those of the most intelligent of the profession and public.

¹ Hearsay evidence is very valuable, but is now excluded, because a jury is incapable of attaching its *proper value* to it. If they could distinguish degrees of credibility, much truth would be exposed to view which now cannot be intrusted to meet their ears.

ART. V.—*Selwyn's Abridgment of the Law of Nisi Prius*.
Twelfth Edition ; with considerable Alterations and Additions.
By DAVID POWER, Esq., Q.C. London : Stevens & Norton,
1859.

"SELWYN'S *Nisi Prius*" is a curious example of illogical abbreviation of titles in a book. Selwyn's "*Law of Nisi Prius*" is no better, while it is longer. It would require some patience to explain, to a foreign jurispudent, the sequence of ideas by which the British lawyer has arrived at the comprehension of the phrase by which the popular work named at the head of this article is known ; now, the first sentence of its preface thus explains the nature of the book :—"The object of the following work is to investigate and explain that branch of jurisprudence which teaches the nature and extent of the remedies prescribed by the law of England for the redress of private wrongs." It being admitted that *Nisi Prius* means neither "jurisprudence" nor "remedies" nor "private wrongs," it would be curious further to point out to an inquiring stranger, that the proviso in the process, where the words *Nisi Prius* occur (which so curiously have been employed to denote a form of trial), has not even been in use since the Common Law Procedure Act, 1852 ; for by the 104th section of that statute, the *distringas juratores* is abolished. But the authority of the "judges of *Nisi Prius*" never was derived from the *distringas*, but by the commission of assize ; and, indeed, the want of a *distringas* in older times would be aided by the verdict. Not so an "ILL *distringas* ; *e.g.*, Holt, C. J., remembered a case wherein Saunders, of counsel at the bar, dropped the *distringas* out of his hand that he might want a *distringas*, which would be aided, and not keep and shew an ill one, which would be naught."—(*Bullock v. Parsons*, Salk, 454.) We shall always keep the term, nevertheless, of "*Nisi Prius*,"

because it is convenient ; and the new edition of "*Selwyn's Nisi Prius*," edited by Mr. David Power (with the aid of Mr. Wolferstan and Mr. Baugh Allen), will be found as useful as a circuit companion and for general reference, as the former editions were when trials took place under older systems of procedure.

The edition with which we have hitherto been familiar is the eleventh, published in 1845, and which, we believe, owed its chief improvement and revision to Mr. Romaine, the present able secretary to the Admiralty ; and our experience of the work is this, that for those who already are acquainted with its contents, and understand its arrangement and defects, it is exceedingly useful for reference on circuit, and on any emergency where elaborate treatises are not at hand. The two volumes, indeed, contain a general statement of the law, quite sufficient in ordinary cases for the purposes of counsel between the delivery of the brief and the trial. One finds, in fact, collected here, in a practical form and sufficient quantity, what one wants. The practitioner who *knows* what he wants, and the student who *wants* to know something about a given subject new to him, alike consult Selwyn with perhaps greater advantage than any other single publication. Nevertheless, it is scientific neither in its arrangement nor in the treatment of subjects ; but this defect is, in a great measure, counteracted by the simplicity of the alphabetical order originally followed by Mr. Selwyn, and adhered to throughout successive editions. Moreover, a clear table of contents, a complete list of cases cited, and an ample and accurate general index, afford a compensation, to a great extent, for the inconveniences which otherwise might arise from that particular disposition of the matter chosen by the learned author half a century ago.

It is no easy task at any time to re-edit creditably a standard work, especially when it covers so extensive a field as does Selwyn's "*Abridgment of the Law of Nisi Prius*." But, in the interval between the last and the present edition of this book, both the forms and the fabric of our laws have been subjected to such important changes, that Mr. David Power has had thrown upon

him even greater responsibility than is usual under similar circumstances.

Probably some would be inclined to think with us, that it would have been better to have cut out with greater boldness more of the old text than has been done; but on the other hand, it must be remembered, that a competent editor is really better able to judge of such a question than those who have made use of his work for a few weeks only. We believe, however, that the true principles to be adopted in editing volumes like those of Selwyn, is to treat each subject *de novo*. If modern cases have superseded those cited in the original edition, or illustrate better what the editor has to lay down or enforce, then the ancient references and the material founded thereon, should be altogether withdrawn—not even retained in addition to what is new. It is an inconvenience, alike to editor and reader, to be encumbered with what can be dispensed with, and the question which the former should ask himself when called on to use his editorial functions, seems to us to be—"How should I best lay before the practical lawyer what he wants to know? Will my meaning be clearer by retaining the old text, modifying it, or cutting it away, and substituting for it my own material?" It is, indeed, easier to do this in such a work as Selwyn's than with certain other text-books. Serjeant Stephen's Commentaries would not be the valuable work it is if Blackstone's foundation had been allowed to interfere more with the general structure than has of late been permitted. Indeed, all recent attempts to re-edit Blackstone's Commentaries have been failures; the last being notoriously the worst.

There is no reason why, with skilful and efficient editing, "*Selwyn's Nisi Prius*" should not, in name and form, but with many a variation from the first impression, go through twelve more editions. The probability of such an event will be enhanced by the present edition being found as useful by the profession as we think it will be.

A twelvemonth hence we shall be better able to say more authoritatively whether the edition now before us has been edited

as carefully as we hope and believe it is. Use is the only test for such a production. A slip of the pen or of the press here and there among 1500 pages, and which any one may discover by chance, is no disproof of general merit and accuracy; and for our own part we discard our old edition in favour of the new one, with mixed feelings of regret at parting with a valued old friend, and of hope in finding in its successor even a better and trustier support in the hour of forensic strife and danger.

ART. VI.—THE LEGAL EFFECT OF WAR WITH
REFERENCE TO CONTRABAND.

TO mitigate as much as possible the calamities and sufferings of warfare, and to restrict them to the belligerent powers, nations have deemed it convenient to act upon certain principles which like the common law of this country, have become fixed by usage, confirmed by precedent, and illustrated by the most eminent jurists.

These principles have been recognized in treaties between civilized nations in all ages, the effect being that countries not engaged in war, nor interposing in it, shall not be prejudiced by the feuds of contending nations. "It is certain," says Vattel, "that, as they have no part in my quarrel, they are under no obligation to renounce their commerce for the sake of avoiding to supply my enemy with the means of carrying on the war against me. Should they affect to refuse selling me a single article, whilst at the same time they take pains to convey an abundant supply to my enemy, with an evident intention to favour him, such partial conduct would exclude them from the neutrality they enjoyed. But if they only continue their customary trade, they do not thereby declare themselves against my interest; they only exercise a right which they are under no obligation of sacrificing to me."¹

¹ It must be a continuance only of such *customary* trade.—*Hall on Captures*, 215—233; Lord Erskine's speech, 8th March, 1808; 10 Cob. Parl. Deb., 935.

It is an inevitable consequence of the existence of war, that discussions should arise as to the commercial rights of nations not embroiled in the quarrel. The result has been sometimes to cripple, but frequently to favour, their commerce; and the belligerents themselves have often found a mutual benefit in the exchange of their own produce, through the instrumentality of neutral carriers. In many of those instances it became the duty and the necessity of the neutral state to assert with decision the commercial liberties of its subjects, the belligerents being influenced by consideration of the power which might be thrown into either scale by such state, when they might have been disposed to ignore the advantages of unrestricted commerce. But though these motives operated to introduce the practice, so varied and complicated were the interests, and so changeable the course of proceeding, that some unvarying tribunal became necessary; and for this purpose the opinions of a few wise men were erected into a code of international law, and something was gained towards permanency and justice by the admission of those authorities.

But the commerce of neutral with belligerent states, to be entitled to immunity, must be legal. "Whenever," says Vattel (Chitt. Ed., 336), "I am at war with a nation, both my safety and welfare prompt me to deprive her, as far as possible, of every thing which may enable her to resist or injure me. In this instance the law of necessity exerts its full force. If that law warrants me, on occasion, to seize what belongs to other people, will it not likewise warrant me to intercept every thing belonging to war which neutral nations are carrying to my enemy? Even if I should, by taking such measures, render all those neutral nations my enemies, I had better run that hazard, than suffer him who is actually at war with me thus freely to receive supplies and collect additional strength to oppose me."

It is therefore very proper, and perfectly conformable to the

It has even been holden that a British-born subject, while domiciled in a neutral country, may legally trade from that country with a state at war with this country, *Bell v. Reid*, 1 M. & S., 727.

law of nations, which disapproves of multiplying the causes of war, not to consider those seizures of the goods of neutral nations as acts of hostility. To limit these inconveniences, and secure as much freedom to the commerce of neutral nations as is consistent with the laws of war, certain principles seem to be generally recognized among civilized nations of modern times. Thus, a careful distinction is made between ordinary goods which have no relation to war, and those that are subservient to it. According to Vattel (336), neutral nations should enjoy perfect liberty to trade in the former; the belligerent powers cannot with any reason refuse it, nor can they prevent the importation of such goods into the enemy's country. The care of their own safety, and the necessity of self-defence, do not authorize them so to interfere; for the goods referred to will not render the enemy more formidable, and any attempt to interrupt the trade therein would be a violation of the rights of neutral nations, and a flagrant injury.

Commodities useful in war, or auxiliary or subservient to it, and the importation of which to an enemy is prohibited, are called contraband goods. What commerce shall be deemed contraband, is a question that has been much discussed between the governments of belligerent states and the merchants of neutral nations. Grotius, in a classification which has been adopted ever since his time, divides all articles of commerce for the above purpose under three heads:—(1.) Materials ready wrought up for the immediate purposes of war; *e. g.*, arms and ammunition designed for war. (2.) Articles of luxury. And (3.) materials which may be wrought up or employed for the purposes of war; *e. g.*, sail-cloth, timber, pitch, sulphur, money, provisions, ships, &c., which, being of use in times of peace as well as of war, are frequently termed articles *incipitis usús* (De Jure Belli, lib. iii, c. 1, sec. 5). Azuni, in his celebrated treatise on the maritime law of Europe, classes under the head of contraband, "*oggetti che possono immediatamente servire per la guerra*" (Dritto Maritimo, c. 3, art. 2, vol. 2, p. 181); and Vattel (337) specifies as contraband, arms, ammunition, timber for shipbuilding, all

kinds of naval stores, horses, and even provisions, when there are hopes of reducing the enemy by famine. But De Witt, in a letter of Jan. 14, 1654, while including among contraband goods cordage, and other materials suitable for the equipment of ships of war, gives his opinion that it would be contrary to the law of nations to prevent neutrals from carrying corn to an enemy's country; and much difficulty has been experienced in consequence of differences of opinion in this respect.

The questions of contraband brought before the Prize Court of Admiralty in this country, during the war times extending from 1792 to 1814, are those from which the English lawyer may best learn the principles as well as the practice by which matters of this nature are determined, and the judgments of our great master of international law are the main sources whence the learning on this head is to be derived.¹

In the case of the *Jonge Margeretha* (1 Rob., 189), Sir William Scott observed that "the catalogue of contrabands has varied very much, and sometimes in such a manner as to make it difficult to assign the reason of the variations, owing to particular circumstances, the history of which has not accompanied the history of the decisions." It is, however, one of the prerogatives of the British crown to make new declarations of contraband when articles come into use as implements of war which before were innocent. This is not the exercise of arbitrary discretion, which the law of nations prohibits; but it is in accordance with the *usus bellici*, which shift from time to time, making the law shift with them. One of the principal criteria adopted by our courts for determining the question, whether any particular articles be confiscable as contraband, is to ascertain whether they be in a rude or a manufactured state; for articles are treated with greater indulgence in their natural condition, than when they are wrought up for the convenience of the enemy's immediate use. Thus Sir William Scott, in the case last alluded to, lays

¹ The courts of the United States of America have very generally referred to, and adopted, Lord Stowell's decisions on questions of prize and contraband.—*Kent's Com.*

down, that though anchors and other instruments fabricated out of iron are directly contraband, yet that metal when unwrought, is more favourably viewed; so too is hemp, as distinguished from cordage; and wheat, from bread or biscuit. The case of the *Haabet* (2 Rob. Rep., 182) seems to have settled that provisions in strictness are confiscable as contraband. In that case Sir William Scott explained the strict law, and the relaxations of modern practice. He observes, that the right of taking possession of cargoes of this description, going to the enemy's ports, is no peculiar claim of this country; it belongs generally to belligerent nations. The ancient practice of Europe, or at least of the maritime states of Europe, was to confiscate them entirely; but a more mitigated practice prevailed in later times, namely, that of holding such cargoes subject only to a right of preemption, a reasonable compensation being made to the individual whose property is thus diverted. In the war between England and France at the close of the last century, this rule, however, was not adopted; for the National Convention (9th May, 1793) decreed that neutral vessels laden with provisions bound for an enemy's port might be seized; and England, by way of reprisal (8th June, 1793), ordered a similar capture of all neutral vessels bound for France laden with corn, meal, or flour.

From a further position laid down in the case of the *Haabet*, just quoted, the destination of cargo constitutes a material element for consideration. "The most important distinction," observed the learned judge, "is, whether the articles were intended for the ordinary use of life, or even for mercantile ships' use, or whether they were going, with a highly probable destination, to military use. If the port is a general commercial port, it shall be understood that the articles were going for civil use, although occasionally a frigate or other ships of war may be constructed in that port. On the contrary, if the predominant character of the port, like Brest in France, or Portsmouth in England, be that of a port of naval or military equipment, it shall be intended that the articles were going for military use." Where the goods are clearly shewn to be contraband, confiscation to the belligerent captor—except in

such cases of relaxation as above mentioned—follows as a matter of course. “Barely to stop such goods,” says Vattel, “would in general prove an ineffectual mode, especially at sea, where there is no possibility of cutting off all access to the enemy’s harbours; recourse is therefore had to the expedient of confiscating all contraband goods that can be seized, in order that the fear of loss may operate as a check on the avidity of gain, and deter the merchants of neutral countries from supplying the enemy with such commodities.” On this account a nation at war notifies to neutral states the declaration of war, whereupon the latter usually give orders to their subjects to refrain from all contraband commerce with the nations at war, declaring that, if they are captured in carrying on such trade, the sovereign will not protect them. This rule is the point where the general custom of maritime states seems at present fixed; and, in order to avoid perpetual recurrence of complaint, it has been agreed that the belligerent powers may seize and confiscate all contraband goods which the subjects of a neutral state shall attempt to carry to the enemy, without liability of complaint being made by the government of such neutral state; while, on the other hand, the power at war may not render a neutral state responsible for these practices of its subjects.

Contraband articles are said to be of an infectious nature, so as to contaminate the whole cargo belonging to the same owner, by which metaphorical language is meant that all the merchandise which he may have embarked in the same ship is liable to seizure and confiscation. This consequence does not, however, except in aggravated cases, extend to the ship, unless she also belong to the owner of the goods. In ordinary cases, the only loss sustained by the shipowner from having contraband articles on board, is the loss of freight and expenses. If, however, the ship and goods be owned by the same person, or if the contraband articles are sought to be protected by a false destination or false papers, the contagion of the contraband will extend to the whole of the ship and cargo, and both will be subject to confiscation.¹—(The *Staadts Embden*, 1 Rob., 26; the *Ringende Jacob*,

¹ All insurances on contraband of war are void, and incapable of being

ib., 89 ; the *Franklin*, 3 Rob., 217.) This general rule, however, is occasionally modified by treaties, as in those of the United States of America with the new republics of South America.—(Kent's Com., vol. 3, p. 267).

Contraband trade, in the proper sense of the word, can only be carried on by neutrals in time of war. Hence, where a clause contained in the commercial treaty, between this country and Portugal, of 1810, excepted from the reciprocal liberty of commerce announced by the treaty all articles contraband of war, this was held to apply only to importation in time of war ; and a policy effected in this country on arms and ammunition exported from Great Britain to Madeira, in the dominions of Portugal, in times of peace, was held valid, notwithstanding the clause, (*Wilbraham v. Wartnaby*, 1 L. & Wels, 144.)

The rights of a belligerent nation against the delinquencies of neutrals, would exist to no purpose if she were not clothed with the practical power of enforcing them : such a power, by the law of nations, exists. We cannot prevent the consequence of contraband goods, says Vattel (338), without searching neutral vessels that we meet at sea. We have, therefore, a right to search them ; a neutral ship refusing to be searched, would, from that proceeding alone, be condemned as lawful prize.

The whole international law upon this subject is admirably summed up by Sir William Scott, in his judgment on the case of the *Maria* (1 Rob. 340), where he establishes three important points :—1st, That the right of visiting and searching merchant ships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destinations, is the incontestable right of the lawfully commissioned cruisers of a belligerent nation. 2ndly, That the authority of the sovereign of the neutral country being interposed in any manner of mere force, cannot legally vary the rights of a lawfully commissioned belligerent cruiser. 3rdly, That the penalty for the violent contravention of this right is the confiscation of the property so withheld from visitation and search.

enforced in the courts of the belligerent country ; *aliter* in the courts of a neutral state, provided the underwriter has had notice of the nature of the articles.—(*Marsh on Insurance*, 75.)

Azuni, in the treatise already referred to, has collected and commented on the various and conflicting provisions of the different treaties and conventions which illustrated the positive law of Europe on the rights and liabilities of neutrals upon the sea, from the earliest times of European history down to the commencement of the great French revolutionary war. Since that time various treaties and conventions, as occasion has arisen, have been entered into, by which those rights and liabilities have been affected. Thus, during the late Russian war, the United States of America entered into a convention¹ with Russia, to the effect, "that free ships make free goods;" in other words, that the goods belonging to subjects of a power at war, are free from capture when found on board of neutral vessels, with the exception of articles contraband of war; and further, "that the property of neutrals on board an enemy's vessel is not subject to confiscation unless the same be contraband of war." The contracting parties likewise engaged to apply these principles to the commerce and navigation of all such powers as should consent to adopt them. Shortly afterwards, a convention, in precisely the same terms, was entered into between Naples and the United States.*

Again, at the conclusion of the late Russian war, a declaration was signed by the plenipotentiaries of Austria, France, Great Britain, Prussia, Russia, Sardinia, and Turkey, which is of so weighty a character with reference to modern civilisation, and has so materially affected maritime law in times of war, that we shall here insert it at length:—

DECLARATION.

The plenipotentiaries who signed the treaty of Paris of the 30th of March, 1856, assembled in conference, considering:—

That maritime law, in time of war, has long been the subject of deplorable disputes;

That the uncertainty of the law and of the duties in such a matter, gives rise to differences of opinion between neutrals and belligerents, which may occasion serious difficulties, and even conflicts;

¹ Signed at Washington 22nd July, 1854; ratified 31st October, 1854.

* Signed at Naples 13th January, 1855; ratified 14th July, 1855.

That it is, consequently, advantageous to establish a uniform doctrine on so important a point ;

That the plenipotentiaries assembled in congress at Paris, cannot better respond to the intentions by which their governments are animated, than by seeking to introduce into international relations fixed principles in this respect ;

The above-mentioned plenipotentiaries being duly authorised, resolved to concert among themselves as to the means of attaining this object ; and, having come to an agreement, have adopted the following solemn declaration :—

1. Privateering is, and remains, abolished ;
2. The neutral flag covers enemy's goods, with the exception of contraband of war ;
3. Neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag ;
4. Blockades, in order to be binding, must be effective ; that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.¹

The governments of the undersigned plenipotentiaries engage to bring the present declaration to the knowledge of the states which have not taken part in the congress of Paris, and to invite them to accede to it. Convinced that the maxims which they now proclaim cannot but be received with gratitude by the whole world, the undersigned plenipotentiaries doubt not that the efforts of their governments to obtain the general adoption thereof will be crowned with full success.

The present declaration is not and shall not be binding, except between those powers who have acceded, or shall accede to it.

Done at Paris, the 16th of April, 1856."

It will be observed that, although the above important declaration does not in the least define what is or what is not contraband of war, leaving this question in its former position, yet it is a remarkable step taken by the leading powers of Europe, evincing an advance in enlightenment amongst them, and progress in general civilisation ; and it is much to be regretted that the

¹ In 1780, and again in 1801, the principles enunciated in articles 2, 3, and 4, were endeavoured to be enforced by the "Armed Neutrality ;" but Great Britain then strenuously, and in the end effectually, resisted their introduction into international law. Sir Archibald Alison, in his "History of Europe from 1789 to 1815" (c. 33, vol. 7, p. 336, et seq. 7th ed.), gives an interesting account of the "Armed Neutrality," and of the causes which led to it.

United States of America¹ should have declined to join the European powers in settling these very important points of international law.

Whether the great nations, which have been wise enough to see their common interest in regulations of this kind expressed as above, will also be wise and consistent enough to abide thereby honestly, by giving a liberal interpretation to the terms employed, remains to be seen. Austria, in the war which is just concluded, declared, without consulting the neutral powers, parties to the Paris declaration, that she would consider coal contraband of war. Now, it is obvious that, if it lie in the power of any one state thus to declare any particular kind of merchandise contraband of war, the effect of articles 2 and 3 of the Paris declaration may, at any time, be entirely neutralized.

That the governments of civilized countries may be led to see the mutual advantages derived from acting upon principles recognized as morally right, may at the present day be well expected. The sagacity which should induce them so to act, would give a promise that wars themselves should be, hereafter, less likely entered upon, or at least speedily and rationally concluded.

ART. VII.—*Literary Remains (consisting of Lectures and Tracts on Political Economy) of the late Rev. Richard Jones, formerly Professor of Political Economy at the East India College, Haileybury, and Member of the Tithe and Charity Commissions.* Edited, with a Prefatory Note, by the REV. WILLIAM WHEWELL, D.D., Master of Trinity College, Cambridge. London: John Murray, 1859.

SOME apology may seem at first sight to be required for the discussion of political economy (albeit connected with the name of an eminent jurist) in a legal review. The extensive

¹ The Americans were unwilling to accede to the first article of the declaration with respect to privateering, which, after all, can be considered as little better than piracy.

basis, however, of legal science, connects it closely with that science which explains the rise of those rights of person and property which it is the object of the law to conserve. On every side, indeed, the subject of wealth has outlets into the science of jurisprudence. In law, as in political economy, no system can long hold its ground which is at variance with social conditions. In either case social conditions are the mould, recasting into its own shape the most rigid and ancient conventions ; and thus even in its prohibitive relations, as well as in those in which it throws its ægis over rights, the law must take notice of the gradual upheaving of new strata of opinion : must forego the obsolete, while it recognizes the binding enactment ; and thus, by the force of her decisions and the tempered wisdom of her judges, illumine the path of the legal reformer.

The Rev. Richard Jones, whose literary remains head our article, was happy in being the main instrument in carrying out a great social and legal improvement, and also in throwing a broad light on some yet untrodden ground in political economy. The character of his mind happily blended the finer qualities of the man of thought and the man of action ; though the equilibrium of his mind seemed finally to rest in practical and proximate ends, rather than in the more distant horizon of ultimate and universal conditions ; and here a certain impatience of long-continued analysis, a geniality of temper sympathizing with the actual and the visible, and the enormous facility with which he brought into action his large faculty of observation, must be pleaded as a reason, and perhaps as an excuse, for certain errors into which this very eminent man seems to us to have now and then tripped, in the more speculative routes of political economy ; and this at the very moment when, in the domain of practical use and of proximate arrangements, in those combinations of concrete facts which tend to the prudential management of the national resources, he was a thinker, perhaps only surpassed by John Stuart Mill, that unrivalled master at once of the science of living and of the art of life.

The natural function of Professor Jones was that of a great

social and economical administrator, as well as an expounder of wide and vigorous economic views. His instinct into truth was quick, his penetration into motives unerring, and his quick sympathies, added to his sagacity, enabled him to trace the probable future of human action both in masses and in detail; well aware too, as he was, that no mere formulas of the intellect could span those various impulses, which, springing from deep social causes, so greatly modify the path of man.

At the age of twenty-two, Mr. Jones was sent to Cambridge, where the robustness of his intellect, his truly natural character, his joyousness and wit, endeared him to his distinguished contemporaries by the banks of Cam; in those old days when Herschel, Peacock, Jacob, Babbage, Ryan, and, we at least may add not the least famous, Whewell, were among the stars which sparkled along her firmament. His health being deemed too weak for the bar, Mr. Jones entered the church, and, as a curate on the wolds of Kent, his practical sagacity and usefulness soon demanded a wider sphere. Taking a great interest in the agricultural welfare of his parishioners, his mind soon emerged into political economy; and, before the year 1833, his name had become celebrated for his work on the "Distribution of Wealth," and his treatise on "Rent." In the year 1833 he became Professor of Political Economy at King's College, London; and subsequently he received an additional appointment. The Professorship of Political Economy at Haileybury was added to his duties. His rare legislative skill was soon afterwards manifested in the large share which he took in the construction of the Tithe Commutation Act, introduced by Lord John Russell in the year 1836, and in surmounting the difficulties which this great masterpiece of successful compromise encountered in its progress. For this good work he received the well-merited reward of a tithe commissionership at the instance of the Archbishop of Canterbury. In the duties of administering this great experimental act—which he turned into a practical reality; in his professorships at King's College and at Haileybury, in which he succeeded to the chair of Malthus; and, towards the close of his

career, as a charity commissioner—this highly meritorious servant of the state passed his laborious life, which terminated on January 20th, 1855.

The present work has been edited by Dr. Whewell. We rather regret the absence of dates to several of the essays, especially on so quick-growing a subject as political economy; some repetition there is, too; but the main desideratum of the work is, a large reference to fixed principles in political economy; a science requiring throughout its structure the constant presence of definitions and axioms, which may act as party walls, preventing common confusion in the extreme admixture of its concrete details. These details may be likened to the condition of a large crowd of men requiring in a limited space barriers to prevent overpressure. The principles of political economy have a constant tendency to press upon and overlap each other; the consequence is, that reasoners must constantly recur to those most fundamental. Thus differing from the gradations, of geometry, where each floor, so to speak, is so aptly placed upon the last—that the first principles once established, we can neglect the ladders by which we mounted. On the other hand, in political economy, in the entanglement of social conditions, we are often compelled to reduce our first principles to the simplest form, in order to observe their normal tendencies when in conflict with other principles; and if, as Mr. Buckle (*Civilisation*, vol. i.) asserts, the science is so much indebted to Hutcheson, who deduced its leading conceptions from the phenomena of selfishness, it is that the stimulus of this instinct is required in complicated cases to show us the direction of our rights, at the same time that it healthfully checks the vagueness of speculation.

In Lecture I, pp. 1—20, Mr. Jones gives us a vivid anticipation of a view lately extended by Mr. Buckle, upon the relative bearing of natural and moral agents upon the production of wealth; and shows us that where the luxuriant bounty of nature is left to its full effect, the agencies of man are oft n stifled, and his labour paralyzed. The author first referred to, while he connects the efficiency of labour with the influence of climate, sees

in the bounty of the soil the operation of one part of external nature on another ; while he traces the efficiency of labour to the operation of external nature, not on itself, but on man. And when Mr. Buckle shows that fertility, or the operation of one part of nature upon another, being less complicated, and less liable to disturbance, comes earliest into play, he has clearly gone far to solve the politico-economical problem of the gradual advance of nations. In the agency of climate, coming later into play, from its connection with the increase of man's personal resources, there is a constant tendency to supplant civilisations which were based mainly on fertility of soil.

With the subject of labour Mr. Jones always shows an intimate acquaintance. In his remarks on this subject, the Professor fails to note that the division of labour is but a case and application of the higher law—the combination of labour ; for the more we break down each process of industry into parts, the more closely must we play into the hands of those who are associated with us in a common end.

In Lecture III., p. 34, Professor Jones opens on the subject of capital ; the vagueness which attends the theory of this word is evidently felt by him. But, in his lucid explanation of its Protean applications, he forces upon us the doubt, whether the term is not more useful regarded simply as "savings," and exposed to no further definition. However we refine upon the idea, it is clear that capital, whatever it is, must depend for its increase partly upon savings from future revenue, partly on its own replacement with profit, sooner or later.

How far rents can be said, as such, to contribute to capital, as cause and effect, or in any other than a recurring cycle (in which the use of capital on land adds to our apparent rent by mixing the pure rent with profits), is perhaps questionable ; for rent does not seem to be an independent addition to the national wealth over and above the revenues which the owner derives from that appropriate natural agent the soil, and which he obtains in full after deduction of the labour and risk of cultivation undergone by the farmer (see p. 41) ; so that, in other words, the same

improvements might be effected by a landlord farming his own land (thus receiving no rent), and capitalizing his profits in order to improve his land.

In Lecture V., p. 63, the Professor lays great stress on the division of capital into that which is "sustaining" and that which is "auxiliary." There may be a question whether such a distinction may not cripple the generality of our views, both sorts of capital being in some sort savings :—the first being "employed to sustain labour, and being saved for that express purpose ; and the other being so natural to men, that no human society has ever been wholly without it. Provisionally used, and not too intently regarded, such distinctions facilitate the register of our observations ; nor does the Professor, in his practical remarks on the subject, seem at all encumbered by it. It is well established, that if what people consume is always exactly equal to what they possess, there will be no residue ; and therefore, no capital being accumulated, all must be employed in gaining food or starve. An overplus can only arise when the produce exceeds the consumption, and its increase eventually becomes a fund supporting all who do not win their own sustenance ; and now an intellectual class is possible, because leisure is possible, and men can attend to subjects for which the pressure of their daily wants would have left them no time."¹

In Lecture VI., p. 74, Professor Jones grasps with great force the condition of the labourer, and shews, what is most important, how the distribution of the surplus, and the condition of its possessors, determine the occupations and efficiency of the non-agricultural artisan class ; yet at p. 79, in a discussion on rents and wages, equally cursory and obscure, he foregoes the opportunity of connecting his rich store of social facts with the science of political economy.

The question of population is treated by the Professor with great amplitude and delicacy of thought ; and the conclusion is brought home to us with enormous force, that the capacity of mere animal increase cannot terrify the philosopher who weighs in

¹ *Vide* a learned chapter hereon in Buckle's "History of Civilisation," vol. i.

the scale not merely the material framework, but the intellect and emotions of men.

Holding to the law that man will ever marry when he has obtained a sufficiency of necessaries, he sees that the term "necessaries" is one of an import which fluctuates with his social elevation; raise its level, and the term then becomes connected with all that dignifies the intellect and the heart—with all that refines our appreciation of the blessings of time and immortality.

The characteristic of Mr. Jones's mind was comprehensiveness rather than depth. The subjects with which he dealt had a tendency to grow large in his hands. But his eye was telescopic rather than microscopic; the microscopic eye which could see the essence, the moving principle, of the fact close beneath him, was wanting. He could take a large sweep of particulars; if he failed, it was in detecting the true character of each unit. His mind was inductive rather than deductive, though saved from the mere empiricism of details by the business-like habit of his mind, and that largeness of observation by which errors of inspection are avoided.

There is no occasion to amplify the domain of induction. On all sides the questions of life present themselves in the concrete form of facts, requiring some preliminary hypothesis before induction can be used. But facts unsorted or ranged together on account of mere similitude, are only empirical uniformities and coexistences; and this undue elevation of the inductive method in its application to subjects requiring another method, is connected with that error as to merely coexistent facts, which has been commented on by the learned writer on civilization we have already referred to.

When speaking of Lord Bacon, he says, "Yet, in reference to the study of coexistences, all his caution, all his knowledge, and all his thought in (applying the method of induction to them) were useless. His weapons, notwithstanding their power, could make no impression on that stubborn and refractory topic." Now the theory of rent, as being one of the most general of any in political economy, is well calculated to illustrate this view of

coexistent facts; it strikingly shews the defect in method which the disavowal of deduction in political economical inquiries involves; and we use the term disavowal purposely, since induction and deduction must, in practice, combine their forces in every branch of knowledge; for every branch of knowledge must have its abstract as well as its concrete portion—that part which is devoted to its science, and that part which is devoted to its practice.

The essential errors of those who deny deduction to political economy, is in forgetting that a principle may remain operative, though its action may become invisible;—invisible from the temporary interference of other and more potent agencies in practice. And our knowledge of the allowances on this score which at any time have to be made, must depend on our knowledge, not only of the temporary and varying circumstances of each case, but also of those more constant, though more latent conditions, which, though invisible in the unit, are potent in the mass. In the observation of the particulars, induction may well hold its own; but in the sifting them, and shewing upon an average of many cases how their mutual perturbations tend to correct each other, deduction, which, if not a more potent weapon, is at least one of finer edge, is our real resource. That part of a problem which, though latent in the unit, becomes at once discoverable in the mass, is more really a part of it than that which is the fluctuating result of circumstance. Take, for instance, the various tenancies of which, in detail, Mr. Jones has given an account, equally rich in learning and in style. Take the serf, the metayer, the ryot, and the cottier. If the relations of each of these to other forms of rent are to be ascertained, some general rule, some centre, to which our comparisons are to be referred, must be instituted. Just so, if we wish to compare the European with the Australian, and to obtain their true points of difference, we must deductively establish a certain standard of humanity common to both; in other words, we must study the idea of humanity, rather than of any given specimen; we must abstract the central idea of

humanity, if we are to escape the danger of confounding the Australian with the ape.

Along with this deductive analysis, however, inductive observations may well proceed side by side, to verify or negative its results, and to suggest new topics to the energies of deduction. This method, too, must be applied if we are to appreciate the real variation of the metayer, serf, or cottier—rents from the farmer-rents, which come so strictly within the law of Ricardo, (that the rent of land consists of the excess of its return above the return of the worst land in cultivation;) for the worst land yields the ordinary profits to stock. Any land, therefore, yields just as much more than the ordinary profits of stock, as it yields more than what is returned by the worst land in cultivation. We must examine, then, whether these metayer, serf, and cottier rents possess the intrinsic qualities of those farmer-rents of which Ricardo speaks, and should only attempt to apply the definition so far as we find some analogy in them to the farmer-rents.

For where rents are fixed, not by competition and a reference to their value in the land-market, but by custom, by tradition, or other forms of superior influence, the rent of land can only approximate to that standard of market value which is thus fixed by Ricardo. In the same proportion as rent is regarded as dissociated from commercial dealing, and a fixed *tenure* rather than a *tenancy* (not transferrable or relinquishable by the parties or their descendants), so far the sums given for the use of land amount to a perpetual quit-rent, rather than a commercial rent, fluctuating, like other things, under variety of circumstances; the sums given for the use of land often tending, as in the case of the ryot, to that maximum in favour of the owner of the soil which is barely consistent with the sustenance of the labourer. Though argumentatively bound to his inductive method, Mr. Jones, fortunately for his well-founded reputation, was not in practice consistent in his devotion. His practice was better than his theory. Men of great power often believe they are thinking inductively when in reality they are thinking deductively—and

conversely; and this because, though masters of their own subjects, they have not also mastered the laws of thought. Moreover, induction and deduction are apt to blend into each other with as much transient delicacy and finesse as do the colours of the rainbow.

Dr. Whewell's prefatory notice teems with such instances; for it never takes into account that no *one* general principle can suffice to explain all the facts which are mixed up with it in the concrete. A general principle, if true, is doubtless applicable to all details; but its application must constantly vary with the various circumstances with which it comes in contact. Take a bit of gold, spread it over a piece of tinfoil, or melt it up with a mass of copper, and how varied is the result—each differs from the other, and both from the piece of gold. So, again, while the definition of the Abstract Circle is always the same, the dimensions of Circles in the Concrete vary without limit.

Thus, in the concrete, rent is always mixed up with other matters, and is usually disfigured, if we may so say, by profit. If, a hundred years ago, a fence was put up or manure thrown in, the profit upon that expenditure was called rent. But rent, in its essence, is the measure of the difference between the natural capacity of the land paying that rent, and the natural capacity of the worst land which the exciting prices make it worth while to bring into cultivation. Many things may in practice intervene to interrupt the action of this law. The farmer may be willing to pay a higher rent for a farm in a locality where his forefathers were bred; or, when he has cast his lot in a farm, he will often be willing to spend surplus capital on it in any way which will repay him a surplus profit, however small, beyond the value of risk, or the interest which he must pay for the capital, if borrowed. Irregularities like these we must expect; for no theories can embrace all the complications of casual circumstance.

As regards the objection to Ricardo, that his principle involves an opposition between the landlord and other classes; in one point of view, looking at the phenomena proximately there is an opposition, but in the higher generalization the opposition disappears; for, largely considered, it is the interest of the landlord to obtain

the greatest profit out of the best land, as much as out of those worst lands which are a measure of the point at which cultivation is possible. It is clear, as Mill shows, that rent does not form part of the expenses of production. Good land is a superior instrument as compared with bad. Supposing, says Mill, a manufacturer to rent a steam-engine of superior power, the rent would not be properly an *addition* to his outlay, inasmuch as in its use he would save the equivalent of what it cost him in his other expenses.

The principle applicable to rent is only a case of a more general principle, that all commodities which are susceptible of indefinite multiplication, but not without increase of cost, receive a value proportioned to the cost of production in the most unfavourable existing circumstances. In the price given for a potato, however temporarily affected by the law of demand and supply, the average and constant value is proportioned to the value of a potato grown with the minimum of profit. On the whole, then, that "the payment which the cultivator makes for the use of land, cannot be described by any single definition from which its amount can be deduced" (to use Dr. Whewell's own words—*Preface*, p. x.), is no more an objection to definition, than the circumstance that arithmetic does not constitute wealth, or that an accountant is not a merchant is an objection to using arithmetic and accountants. Surely the tribute of respect to Ude or Chevet is not the less because the material basis of the feast is supplied by the wealth of the host; so generalizations cannot indeed furnish us with concrete facts, yet are they ticketed shelves on which, as in a museum, we place them. Thus, a man with a copious range of generalizations is so much the more likely to outshine the man who has them not (and this, too, even in the knowledge of concrete details), as the man who has a large storehouse is more likely to seek for things to put in it than he who has none.

Thus, men are not even invited to the accumulation of details, unless they have pegs whereon to hang them when obtained; so that, were a man's memory full of the concrete facts of rent, his

knowledge will be but inert—it will only oppress him unless he can by sheer thought distil their essential spirit. But, as close thought and close observation are seldom united in one man, he had better resort to the generalizations of the master-spirits who are the glory of our race. Men like Ricardo or Mill afford the leverage by which one concrete fact may be welded into another. Facts, *as such*, are barren; it is not till we break their husk and find the kernel that we discover their hidden energies.

With these views of economical science the analogies of physical science coincide. Dr. Whewell (p. xvi, *Preface*) urges, indeed, that as the force of gravitation is constantly counteracted by such facts as those evinced by the cohesion of rocks, tenacity of ice, and so on; so also the tenure of cultivation is determined by many other circumstances than those connected with mobility of capital. True, the *action* of gravitation is counteracted, yet the law remains. True, the *action* of Ricardo's theory is interrupted, but its force survives intact; for, remove the opposite tendencies, which are the casual perturbations of a great law, and it is then seen in its majesty, with a constancy and universality within the area of its rule, as marked as that with which the dome of St. Paul's at a little distance towers over the roofs which obscure a nearer view.

Lastly, all the forces and attractions which perturb for a while our evidence of the action of such great principles as Newton's gravitation, or Ricardo's theory of rent, also counteract each other, and this with an increasing tendency, as the observations from which we obtain our averages are extended, till at length they practically neutralize each other. And it will be found that each varying system of actual *rent* (as distinguished from mere tenures and joint-proprietorships), however much they differ among themselves, pay some tribute to the theory of Ricardo.

Indeed, on the theory of rent propounded by Mr. Jones and Dr. Whewell, the political economist would become a mere land-surveyor; since, in the concrete, not only all the peculiarities of the metayer, the serf, cottier, and the ryot, become important, but also the terms of each separate man's personal holding.

Where, then, is the subordination of general principles to mere details to stop? Surely there must be some point at which we must pause and analyse our records of fact, if we wish to escape the fate of a botanist, who was so fond of collecting that he died before he had time to learn the structure of a single specimen.

It is obvious that the theory of Ricardo pre-assumes, as a condition, such freedom on the part of the tenant. Mere dead force, despotism, or custom, cannot create a tenancy of which competition for holding can be an incident. What is the position of the serfs? In return for a certain amount of labour to be bestowed on the soil, these men are allowed a certain share of the estate for their own subsistence. Mr. Jones admits that they are not unfrequently found in a state of personal slavery (p. 198); that the state of bondage and dependence in which they exist to their lords (a condition incident to a rude population, in times of scarcity obtaining a bare subsistence), places them in a position in which, struggling for life, they can be scarcely termed tenants in a commercial sense, any more than the brutes which aid their labour.

Take the case of the ryots, the hereditary occupiers of the East. These men Mr. Jones admits to be at the mercy of their sovereign, and any exercise of his right might push them to starvation, &c. (Jones, p. 457 and p. 211); and he sees in this state of things the main cause of the subordination which makes it possible for a foreign government to rule a distant people (and we would add, perish our rule rather than it should become an eventual check to the civilisation of our Indian subjects). Here, again, there is nothing analogous to that sort of tenancy which Ricardo's theory embraces; for the ryots are a race of labourers on the soil of the State, upon whose sense of justice, rather than on any rights which they can themselves enforce, they repose. Is this, then, a legitimate tenancy?

The metayer (p. 202, Jones) is a peasant-tenant, extracting his own wages or subsistence from the soil, and paying a produce-rent to its owner. Thus, he occupies a grade between men like serfs and ryots, and the cottier and farming-tenant. The

fixed and languid condition of this tenure it is not hard to explain. In the first place, it would seem to be a tenure involving some perpetuity of interest in the descendants both of the owner and the metayer, each with claims sufficiently vague and indeterminate to prevent the stimulus to high exertion, and without that element of easy transfer of the land to new cultivators, which would introduce the life and energy of competition into the lethargic reign of custom.

The cottier system does involve competition ; and, when the land is not at a monopoly value, the Ricardo definition of rent is seen at once to apply ; in other words, the meanest cottage which pays some rent would be a guide to a landlord demanding a rent for his newly built one. Here, however, the principle of population is brought to act directly upon land, and not, as in England, upon capital ; for the demand of land depends on the number of competitors, and here these consist of the whole rural population ; and the rent being regulated by competition, and land thus obtaining a monopoly value, the principle of ascertaining the rent from the principle of the superior value of the land itself, becomes absorbed in the yet earlier principle of supply and demand.

However, the cottier and metayer rents do afford some indications of the universality of the theory of Ricardo—that is, as soon as the owners and cultivators of land are placed on some ground of equality of contracting power, this equality of contracting power being necessary to prevent the constant injustice done to the cultivators of the soil, an injustice never remedied till the capitalist farmer, able to bide his time and being at the mercy of nobody, enters the scene.

England is a hothouse for the creation of capital when compared with other countries ; but, compared with his ideal, Mr. Jones well notes her deficiencies. He sees a large number of agriculturalists waiting for employment, which does not exist for them at the country workshop ; while he rates, at a very small proportion, the numbers of these employed in the great manufactories. These complaints are scarcely pertinent now, while railways and improved communications are constantly tending to

enlarge the sphere of productive successes; while they facilitate the transference of skill and capital to the localities where most beneficial.

In page 410 Mr. Jones raises, rather than solves, the interesting question of the compensating relations between wealth and poverty in regard to virtue and vice; a question which the economist must assume to be settled eventually in favour of wealth and virtue.

In Lecture V., p. 415, Mr. Jones discusses the labour fund of the world, and lays deserved stress on the great share which, in the earlier ages, self-produced wages have in the sustentation of mankind: a condition of things which always closely borders in practice on that in which the chief labour-fund of a region consists, of revenue expended in labour; for where, from any cause, the stimulus and efficiency of labour is not strong enough to produce capitalists, or men possessed of such an amount of savings as makes them insist on their civil rights, they are always apt to be enslaved to a despot who concedes to them the bare means of living, receiving the revenue himself. This is the state of a large and most fertile portion of the earth. In India the stimulus to labour is weak, in consequence of a soil and climate so prolific as never to induce those habits of toil and exertion which the hardy northerners attain, and which they owe to the niggardliness of nature, which imposes on them, from the necessities of diet, a struggle with the most subtle and ferocious animals. In easy circumstances, the self-producing class has a tendency to become absorbed in a mass of population, mere tributaries to the state; or, which seems the first step to the creation of capitalists, to attach themselves to men who, while their power, rank, and knowledge enable them to wrest from the tillers of the ground the greater part of the profits, occupy something of the position of capitalists towards those who, whether serfs, metayers, cottiers, or hereditary occupiers, are more immediately connected with the soil.

Wherever Mr. Jones enters upon the practice of political economy, as distinguished from its philosophy, or when he catches a glimpse of the latter by his quick insight into the wants, pas-

sions, and minds of his fellow-men, he seems to breathe a more congenial air. No longer trammelled by words or definitions, his quick sympathies enable him now to place before his audience the concrete man, warm with his hopes and impulses; while his own knowledge of the pressure and form of outward circumstance, surrounding us like an atmosphere, and his quick perception of the useful and the adaptive, enable him to forecast the bonds and restrictions within which free agency must be limited. This power of realizing in colour and form the very life of the labourers, gives Mr. Jones unusual scope for observing the many agencies which determine their social condition; in truth, he seems to place them by his side while giving them sound practical advice, which he depicts in language whose vital energy never fails to touch the broad experiences which, by a quick intuition of the moving pulses of others' thoughts, he seems to make his own. For instance, Mr. Jones in his last Haileybury lecture is full of suggestions for raising the condition of the people, and thus to stop the mere animal growth of population by introducing the human refinements which check it. It is clear that all the inducements by which Mr. Jones would increase to the utmost the standard of refined comfort, and of intellectual and moral wants, act *suggestively*, and upon the *associations*. And we would add to Mr. Jones's remarks, that the more healthfully fastidious our notions of comfort in the married state become, the more also shall we be select in the choice of a partner of life. The accomplished scholar feels far more resignation in the absence of matrimony than the boor—to whom, if he can but stock his farm, the question as to who shall become his wife is comparatively insignificant. In reference to the purchase of comforts and the laying by of rent, such matters as the form and time in which it is paid become important; much, too, depends upon dearness or cheapness of comforts; and much, too, upon the abolition of those notions of protection and interference, which, while checking its true scope and activity, seek to encourage labour by such bonuses as those of the French government to their potteries at Sèvres, whose expensive luxuries remain

unsold because beyond the reach of the masses—a great contrast with our Staffordshire potteries, whose cheap and graceful wares every labourer can purchase.

The value of a gradation of ranks in facilitating the rise of the labourer into more elevated notions of comfort and refinement, by the examples of those next above him, is remarked on by the professor. But the value of this principle, as one of far higher scope and importance than any of the others to which he alludes, is missed when it is not remembered how great the stimulus thus given to the intellect itself, by the diffusing over all ranks of common ideas and sympathies.

We see, too, how the arrestation of the direful consequences of a fall in wages takes place in nations, which, becoming acquainted with comforts, are actuated by prudential motives, and thus diminish their marriages. Yet does the professor fully admit the value of an increasing population with increasing means; and we would add that, wherever we place the pressure of population on the means of subsistence, some such incentive is required to fire the activity of the national mind, and to vary its protean resources. On the whole, this lecture is a rare specimen of genial and exuberant thought and information.

Upon Mr. Jones's remarks on the theory of Ricardo, p. 583, we would answer that, if, before discussing any of the elemental questions of political economy, it were required that the concrete phenomena should be universally the same, there could be no such a thing at all as the science of political economy. Now, in the same way as it is assumed that the *action* of Ricardo's law (not the law itself) must vary with all the causes which intercept men's capacity to deal in the best way for their own interests, so too the law of profits, and the laws upon which the law of profit itself depends, become more or less dominant in action, as the freedom of action, of intercourse, and of trade, is more extended. Surely there is as much a tendency all over the globe in profits to equalize themselves, as there is a tendency in water not intercepted to fill up a vacuum. If only we can shew that there is a normal tendency of profits to an equality (the

consequence of the competition of labour and capital), in the smallest degree, the principle of Ricardo is fully avenged. Equality of profits only means, in this argument, that there should be some standard on which our expectations of profit must be based; without it, we need not say that the most matter of fact economist would be utterly distanced by his weekly bills.

Upon Mr. Jones's assertion that rents form an addition to the national wealth, it is clear that there is an ambiguity. The rent itself expresses part of the produce of the country, that balance which is paid to the owner of the land, after the claims of the cultivator are satisfied; it is not therefore wealth itself, but a form of distribution. The wealth would equally consist if the owner, cultivating his own land, should, beside retaining all that would otherwise have to be paid to him, keep also what would have been claimed by the cultivator.

This morbid distaste of generalization is, we think, the defect of Mr. Jones's work. Mr. Jones's practice is better than his precept; and we often find him, by a fortunate impulse, gliding towards a general truth. We regret, too, that Mr. Jones's anti-deductive views should have been so hastily endorsed by a name so illustrious as that of the Master of Trinity. Despite such errors, Mr. Jones's works are valuable, and as a master builder rather than as an architect of the science, political economists will long pay a deserved tribute to the memory of Richard Jones.

ART. VIII.—*A Manual of the Roman Civil Law, arranged after the Analysis of Dr. Hallifax.* By GEORGE LEAPINGWELL, LL.D., Barrister-at-Law. Cambridge: Deighton, Bell, & Co. London: Bell & Daldy. 1859.

A MANUAL of the Roman law is a natural result of that increased attention which has been given of late years to the scientific study of jurisprudence, both at the Universities and by the Inns of Court. Farther, of this movement, which at the

Universities and the Inns has proceeded without concert, or even mutual recognition, a work published at Cambridge by a barrister resident there, and holding office in the academic body, naturally suggests to us the University side; and we may therefore suitably commence our notice by some general remarks on the functions of the old universities in reference to the study of law.

The ancient English theory of superior education, so far as our national practice in this matter rested on theory at all, would appear to have been that up to the age of the student taking his B.A. degree, commonly now about twenty-two, though two generations ago it may have averaged a year earlier, the general culture of the mind was all that needed to be attended to. The classical languages and authors, a larger or smaller portion of mathematics or logic, and, more important than either for the multitude of students, the give and take, and refined common-sense of a gentlemanly world, acquired in a society of equals—these were the armament with which, at twenty-one or twenty-two, the youth was equipped, and expected to cut his way through the thick forest of difficulties which besets the entrance to any special occupation. The sentence which we have just penned would have startled any one who lived when these things were not only so, but were unquestioned. "What!" he would have said, "do you throw together in one general description the senior wrangler and the wooden spoon? The man who has profited most by the studies of the university, and him who, if he has profited by them at all, has only done so indirectly, so far as something of their influence must make itself felt in the daily intercourse of the place?" Yes, for our present purpose we throw them together, because the studies had nothing professional in them, and would only serve to train for a profession through the effect which they might have on the mind and character. Then came the special preparation, to be picked up as the individual pleased, or as hazard directed. If he was to be ordained, he read for his orders such books as were required by the particular examining chaplain of the particular bishop. If he chose the bar, he learned his law, or failed or omitted to learn it,

in the chambers of a practising counsel or pleader. If he went into parliament, or the diplomatic service, his knowledge or his ignorance of political science, of modern history, of international jurisprudence, was what it chanced to be. And parallel to all this, though beyond the sphere of the universities, was the general inefficiency, or even absence, of tests of fitness for medical practice, commissions in the army or navy, and indeed for any sort of employment. It is almost needless to say that on the continent the *general* part of education was always got over at an earlier age, and the *special* part relatively more important, and more systematically attended to. But for some time past a very strong reaction has set in, even in England, in favour of special training. We have been taught by bitter experience, that generals are seldom heaven-born; that learned men may preach to empty churches; that empiricism in law and medicine is very different from sound and useful knowledge. In a word—and this remark, though its principles may be far more generally applied, we now frame with especial reference to law—we have found that if you set a man down to commence his learning at an age when to learn solidly already begins to be irksome, and when the success which on the long run attends solid learning cannot be relied on for a stimulus, because the needs which must be supplied will not wait for the effects of a learning which only succeeds upon the long run, then you will make a practitioner under whose hands drafts and statutes will run to an inordinate length, because they will seek to exhaust particulars by enumeration, instead of providing for them by laying down principles; precedents will be heaped up without measure, because they will be used without reason; the forms of procedure will be filled with pitfalls, because they will be merely technical; and the memory will be the faculty chiefly called into play, because it is that of which the possession depends least on the culture and self-command of the possessor. Under the feelings of these evils special training has been lately instituted in England, or at least greatly extended, for most vocations of life, and tests have been established where none previously existed, or made more stringent where they were not

before unknown. At the same time, though this perhaps forms but the lesser element in the recent educational movement, attempts have been made to render the general part of an English liberal education more really general and liberal, more worthy of an age which has added so much to the range of human knowledge.

Now the particular result of all this which we wish at present to consider, is that a vast amount of new educational work has been created in the country, and that no attempt has been made to apportion it on any principles between the various institutions which have to perform it. We do not mean to say that such an attempt, if made, would have been altogether successful. On occasions like these, plan beforehand as skilfully as you may, experience will defeat much, will modify more. Nor again can the best plans, even when already supported by experience sufficient at least for a presentiment of the effect, force their way rapidly against old habit, or the instinctive grasp with which man seeks to retain possession when he has it. We will illustrate what we mean. Suppose an old habit of sending youths to the university till they are twenty-two, and therefore a university in possession of its students till that age. One may be satisfied that certain things which Cambridge and Oxford now undertake to do for their students, might be done better for them elsewhere; but can we blame severely the reluctance of *alma mater* to part with her sons, or can we fail to praise warmly her strenuous effort to do what she can for them while they are with her? Those who have taken any interest in the recent development of the old universities, well know that such considerations have had a powerful effect. The best arguments to shew that London, and not Cambridge, is the right place for beginning, as well as for pursuing, the study of English law, have been met, and with an undeniable force, by the reply: "the men are here, and we must do something for them." Nor again must it be forgotten that, as a consequence of the isolated position which in this country local bodies and corporations hold towards each other and the government, Cambridge, if she encouraged her undergraduates to defer

the commencement of their legal studies till they arrived in London, would be trusting to a certain scheme pursued by the inns of court, of the practical working of which few of her resident members can know any thing; and which those inns, receiving so large a proportion of their students from extra-academical sources, would at present be quite unable to frame with reference to any assumed previous university course.

Must, then, our new educational activities remain doomed to a blind chaotic weltering? or is there no escape from that but to call in the aid of a central authority, to show us our respective places? We need not stay to argue with Englishmen that the latter course would crush out tons of spiritual momentum, for every pound of such momentum which it would economise by removing obstacles; but we think that by presenting from time to time the considerations which, so far as can yet be predicted, are likely to govern the ultimate solution of the problem, the date may be accelerated when that solution shall be worked out through the self-governing powers of our countrymen. With this object, we will offer to our readers some reflections on the plan which finds favour in certain academical quarters; that, namely, of introducing at the old universities an elementary study of law, by which those who looked forward to its practice may be prepared for grappling in London with the details.

First, then, we would say that no study can really flourish any where, unless it engages a fair proportion of the best talent of the place; but that this cannot happen with any elementary study of law at Cambridge or Oxford, for the best talent will there always be devoted to those studies which carry the fellowships. The major of this proposition will hardly be disputed. It is the highest students who give the intellectual tone to their competitors, and the energy and attainments of all the rest are in proportion to theirs. This influence, propagated among the fellow-students through the powerful sympathies of youth, and their natural disposition to imitate their leading companions, reaches even the teachers. The professor is languid whose class contains few disciples, or none, of more than average ability; increase the numbers

of these, and his efforts and his success redouble. Thus the faculty of law, standing apart from the regular studies of the universities, has dragged on at them an existence never more than half vital; nor, if the number of its votaries were increased by those whom exceptional circumstances, or the conscious absence of conspicuous ability, detached from the main race for fellowships, can it be supposed that it would thereby gain any advantage except in numbers. But the minor of our premises may perhaps be disputed. It will be asked, why may not some of the great prizes themselves be devoted to law? We answer, because the prizes are too great for the merely elementary study of any science. With the utmost desire to see fellowships conferred as the reward of more varied attainments than those which have hitherto commanded them; to see, for instance, physical science and the oriental languages elevated to the academical rank which belongs to them not less for their educational value than for their intrinsic importance to humanity, and especially to England, we must yet assume that no slight proficiency in any thing can give a just claim to a fellowship; and therefore the notion that these rewards can ever be widely used as incentives to the study of law, is inapplicable to the question which we are now considering, which is merely that of breaking ground in that study at the universities.

But then, it will be said, why limit the argument to that question? Why should there not—and this idea, too, has had considerable currency in the still chaotic subject of university reform—why should there not, at Cambridge and Oxford, be great schools of law, large enough and thorough enough to employ and reward in their higher branches some tolerable share of the academical intellect? No doubt it is very seductive to the university mind, to dream of wiping out the blot with which the English universities have so often been reproached by their foreign sisters; namely, that the faculty of arts has absorbed in them all other forms of mental activity; and, as the project takes the shape of reinvigorating the ancient faculty of law, it wears that appearance of conservatism under which the English Radical

is so apt to cloak himself, and to revolutionise the essential nature of an institution, while he maintains its shell. That in the present state of English law, its study can be usefully prosecuted to any length otherwise than in close connection with its practice, is what no one at all acquainted with the subject can suppose. In order, then, that a comprehensive and flourishing faculty of law may become even possible at our universities, there must first be so sweeping a change in the structure of our law itself, as is not indeed inconceivable; and we, as advocates of codification must admit it to be, to a certain considerable extent at least, desirable; but which, at any rate, is not likely to be speedily carried out. But suppose it carried out, what then? Unless not only the structure, but the matter of our law be thoroughly changed, with which would our codified jurisprudence stand in the closest connection? With the history and social life of ancient Rome, or with the history and social life of modern England? Through the adoption of the Roman law by the continental nations, the study of their municipal jurisprudence, even when codified, is to this day so intimately connected with that ancient learning which belongs to the general part of a liberal education, that it stands in the universities in a close and natural sequence on the faculty of arts or philosophy. Here a similar result can never happen. As soon as he steps beyond the threshold of English law, the student will always require to be familiar with the business transactions of the society around him; with the variety and complication of settlements of property, mercantile arrangements, and contracts which it has never been attempted to compress into classified forms. This knowledge he can only gain in the chambers of counsel; and it is while passing through these that his real study of law must therefore be made. Thus the attempt to erect a flourishing faculty of law at an English university must, we affirm, be as fruitless as it would be in substance novel: and, we would observe, that even on the continent important inconveniences arise from the exclusive cultivation of the science of law in bodies which are not concerned with its practice; for not only is there much clumsiness occasion-

ally exhibited, where codes have not been introduced, in adapting an ancient rule to the exigencies of modern life, but, what is worse, complaints are frequently heard of the obstinacy with which errors, exploded in the science, maintain their ground in the practice. In England, if our legal science is sometimes empirical, at least our juridical practice ever represents the very best of that science which is to be had at the time.

To return, then, to the opinion which would limit the study of law at Cambridge or Oxford to a breaking ground preparatory to a complete cultivation in London, another objection lies in our view to such a course, on the general principle that no study should be taken up before it is really time; but, when it is really time, should be taken up in earnest, and carried through to its close without interruption. To play with a pursuit, or potter about it beforehand, the mental energies unbraced by any immediate stimulus, produces desultory habits, and seldom fails to prevent real application when the necessity arises for it. The curiosity which was excited by opening new vistas of knowledge has been allowed to pall: the pleasure which is felt in the effort to assimilate new intellectual food has been allowed to deaden: the sense of incompleteness in his information, of obscurity and uncertainty in his new range of vision—one of the most difficult for a young student to support—has been suffered to remain till it has become very supportable, nay, till it has been transmitted into its own opposite, the confident half-knowledge which is the most fatal bar to farther progress; so the allies in the student's self, with which nature has furnished the teacher, are found to be no longer available, just when fresh interests, which have supervened while the study was interrupted, are alone sufficient to create a feeling of disgust in attempting to revert from them to a twice-told tale. Surely, in nothing more than in learning, is it necessary that whatever thou doest should be done quickly and with all thy might; but no plan can reverse these precepts more thoroughly, than to begin, to interrupt, and to begin again elsewhere, a study which, at best, is apt to be hard and dry.

We are well aware of certain so-called practical answers which

may be made to these views, but they spring out of circumstances which in themselves are by no means unalterable. It is late to begin the special study of a profession after a degree generally taken at the age of twenty-two. It is so: but while, on the one hand, we may be thankful for the national wealth which enables us to be so lavish of the years of youth, and for the manly simplicity of character which is not a little due to the absence of precocity, it is certain, on the other, that were our schools properly efficient, that general part of a liberal education which seems the proper province of an English university might be much earlier completed, and the special part earlier commenced in its appropriate locality. Again, if men make proper use of the opportunities afforded them in the chambers of practising counsel, they cannot have leisure to study the science of law at the same time, and so a year's preparation for entering chambers may be as well taken at the university as at the inns of court. We deny the general truth of the assertion: few are the chambers, and exceptional their condition—for that condition must imply a great disproportion between the amount of business and the number of pupils in them—the student in which cannot both read, and use his opportunities, without any such labour as ought to be judged excessive by one who hopes for his reward in the still heavier labour of successful practice. The former and lighter toil is indeed no bad test, certainly not too severe a test, of the possession of the stamina needed for the other, aggravated as that other is by the continual sense of responsibility. But, were the assertion more widely true than it is, the remedy would have to be sought in some modification of the present system of study at the inns of court, a system of which we now have but the rough draft in operation; and not in dissociating from the sight of practice a study which, we maintain, requires the sight of practice almost from the first to clear and correct the conceptions.

While, however, we believe that it is on these principles that the future course of the study of law in England will depend, we do not forget that, for some time to come, there will be an opportunity at the old universities to do much for men who are going

to the bar, who are already at an age when special professional training ought to commence, and who feel no call towards the higher honours and more richly endowed pursuits of the Cam or the Isia. The question, of what nature should be the work there done for them, will perhaps be best solved by making it coincide, as far as possible, with what ought, as a part of general liberal education, to be done there for all? If the elements of moral philosophy be necessary to a cultivated man, there is no doubt that they are best presented in connection with the elements of law; that natural obligations are most clearly understood when paralleled and contrasted with legal ones; and that for the unconscientious looseness, which is often observable in ethical definitions and arguments, the best corrective is that severity which jurisprudence has derived, not more from its evolution in the actual conflict of interests, than from the reverence with which men approach the discussion of facts, and of rules which are meant to be practically enforced. Nor again, if the universities, departing in this from English precedent, should, as a part of general education, attempt to connect morality with law, will it be any cause for regret if, by farther attempting to combine in this the generally educational with some introduction to a special training, the general and shadowy should become more human by investing the dry bones of theory with more of the flesh and blood of fact. The time may come when, with a good system of legal education at work in London, a short residence there, in the centre of business, may be thought the necessary complement, even for the independent gentleman, of a university career. Meanwhile, it may be possible for the universities to do, to a considerable extent, that which, for the reasons already detailed, we are disposed to think will ultimately be best done in London.

It is neither necessary, nor our purpose, to write a eulogy on the Roman law, or to shew how far it may present the best foundation for such a course as we have indicated, wherever pursued. It may be assumed that it always will do so, and more particularly at the universities; only, whether we regard it as

entering into a liberal education, or into a special preparation for the English bar, it is obvious that its definitions and classifications, its mode of thought and the internal connection of its parts, are for us incomparably more important than its minuter details. The enduring merit of the Roman law is, that it is the work of a people who seem to have been raised up for that particular end, at a time when the vocations of races appear to have been more marked and separate than they are now. We can therefore no more dispense with the Romans to teach us law, than we can with the Greeks to teach us art; and if that inner spirit and connection of his jurisprudence, which the Romans knew by the phrase *ratio juris*, could in any tolerable degree, and even so far as concerns the great outlines only of the Roman law, be transferred to the minds of our students, that it is which we should mainly desire for them from this source, whether as gentlemen or as lawyers. Another object which should never be lost sight of in the modern study of the Roman law, is its historical development; for in the ten centuries from the twelve tables to Justinian, the constitutional and social life of the nation underwent great changes, to which the law was progressively adapted; and, not to mention the interest of thus tracing the first introduction of many principles which have become a second nature to us, we have in this an instructive series of examples of the mutual connection between legal rules and political and social facts—such a series as is not furnished by the history of English law, the changes of which, for better or worse, have too often had but accidental and technical occasions, with little or no reference to the necessities of the times. And at the universities there are greater facilities than elsewhere for presenting this historical side of the subject, since the facts of Roman history and manners are fresher in the minds of the students, or may even be acquired in the philological course at the same time that the outlines of Roman law are learnt in the juristic course.

Dr. Leapingwell, however, has not aimed at any philosophical treatment of his subject, but at producing a compendium of so much of the details of Roman law as, by a terse method of state-

ment, and the careful avoidance of collateral illustrations or remarks, can be compressed into three hundred octavo pages. We do not hesitate to say that this is not the kind of work, which, however accurately executed, we should think most profitable for the beginner. A volume of such character, one half the size of that before us, if made by the student himself, as both an exercise in mastering the subject, and an aid to his memory in after times, would represent an amount of reading which could not fail to leave a deep impress on the mind; so that, whenever the eye of the compiler glanced on a curt sentence of the manuscript, a living picture would be called up of the details and connections needed to clothe the skeleton sentence with a body. A very large part in fact of Dr. Leapingwell's matter is, both in form and substance, just what it was evidently meant for—matter which an examiner would be very glad to see, and give very high marks for; but the examiner would be glad to see it just because he would know to a certainty that it could not have been acquired as reproduced, but must indicate still wider reading and knowledge; because, in a word, he would see in the candidate's papers what the candidate himself, or, if you will, the maker of our supposed manuscript, would see in his own sentences when recurring to them after a lapse of years. But suppose a student beginning with such a compilation made for him by his tutor, instead of ending by making something like it for himself. Allow for the proportion of misapprehension, inevitable where the statements are so short and dry—for the lapse of memory, where so many isolated facts are to be remembered—for the false links imagined to connect those which are remembered, where every step beyond the printed word is upon unknown and therefore unsafe ground; and then judge what must be the net product in an examination, or in the student's own mind.

But we are compelled to say, that Dr. Leapingwell's volume so abounds with instances of haste and inaccuracy, that it cannot even claim such credit, as, from the long popularity of Dr. Hallifax's analysis on which it is founded, it would seem that in some quarters the plan possesses. It is somewhat remarkable

that on the very threshold, our author, for his only illustration of a legal right, chooses, without any warning to the student, one which does not exist by the law of England, though it did by that of Rome:—"If I agree to sell my horse to my neighbour for £20, and, he having paid into my hands the £20 so agreed on, I then refuse to deliver to him the horse, the law will compel me."¹ In the next page is something yet more startling:—"Law is a rule of action prescribed by some superior, and which the inferior is compelled to obey." Very well: but, if so, it follows that the laws of nature, which are mere fixed sequences of events, are only called so improperly, as all have admitted who define law in that manner. We are amazed, then, to read as an "*example*," "*minutely testing the accuracy of the definition*," that if one weight draws up another by a string passing over a pulley, it is the superior which the other and smaller weight obeys. "Make them equal, and they will remain at rest. There is no longer any superior, and the *rule of action* is gone."² So Cambridge has lived to learn that there are no laws of equilibrium, and that statics are no longer a science!

It is disagreeable to condemn; but when a book lays claim to be a manual for youth, the vast importance of preserving the latter from confidence in an erring guide, must overbear all other considerations. Lest, therefore, it should be thought that in the technical part of the work Dr. Leapingwell is sounder than in the philosophical, it will be necessary to make a few more citations. Thus, *jus singulare* is said to be "called also *privilegium*."³ The *tria verba* are explained as follows: "*Do, Dico, Addico. Dabat*, the prætor granted petitions to sue and to plead. *Dicebat viam in vindictis*, he determined what form of action the plaintiff should adopt (*sic*). *Addicebat*, he gave judgment:"⁴ in which last interpretation, if an explanation be possible not totally wrong in spirit, the latter certainly is indefensible. And, besides the mistakes, how much of the meaning of the *tria verba* is here even attempted to be covered?

¹ P. 20.² P. 22.³ P. 22.⁴ P. 29.

. . . . "The *edictum perpetuum* was called the *jus honorarium*, being chiefly derived from the *album* of the prætor Honoratus."¹(!) "If the slave were under thirty years of age (when manumitted), he only became a *Latinus Junianus*. But a *Latinus* might be raised to the privileges of a full citizen if his master afterwards manumitted him *apud consilium, justâ causâ probatâ et adprobatâ*,"² citing Gaius, i. 18; a passage we should have thought by no means difficult to translate, and which simply describes the first manumission under the *lex Ælia Sentia*. The *iteratio*, or second manumission, mentioned in the third title of the long fragment of Ulpian, did not apply to those who were under thirty when first manumitted, and was not made *apud consilium*, but in any of the three regular modes, *per vindictam, per censum, or per testamentum*. These will be sufficient instances of the great blunders; but we must also remark that a want of acquaintance is shewn with the best modern learning on the subject, though less than might have been expected from the meagre list of authors cited, because, as we gather both from the hint in the preface and from comparing several passages, the author has been to a considerable extent guided by the valuable work of Dr. Colquhoun, in which so many of the results of that learning are collected. One specimen of adherence to exploded error may be mentioned, because if, as is likely, the author had seen the truth in Colquhoun, it will furnish at the same time an instance of that besetting sin of compendiums, the preference of short statements to long ones, *cæteris imparibus*: we mean the assertion of a *plena pubertus* at 18,³ when the Romans knew no such name, and there was really nothing more, after the true and only *pubertas* of 14, than the gradual accession of various powers and liabilities, which, as well as the ages when they respectively arose, require to be severally mentioned.

It must then be confessed that a good English work on the Roman law, for beginners, is still a desideratum; and we cannot

¹ P. 30.² P. 42.³ P. 35.

better close this article than by pointing out to those who may be competent to supply it, how great a reward may be reaped in a seemingly humble field. For, were such a work executed as it should be, it would bear no mean part in impressing on the next generation of English lawyers those clear and accurate juristic ideas, the want of which is perhaps a greater obstacle to the simplification and amelioration of our laws, than any inherent difficulty in the case, or than the opposition of any prejudice or any interest.

PAPERS OF THE SOCIETY FOR PROMOTING THE AMENDMENT OF THE LAW.

I.—ANNUAL REPORT OF THE COUNCIL, FOR THE SESSION 1858-9.

(Read at the Annual Meeting, June 25, 1859.)

IN presenting their Sixteenth Annual Report, the Council have to express their regret that the period which has elapsed since the date of their last Report has not been favourable to the progress of Law Amendment, either in the way of measures passed by the legislature, or in respect of popular feeling on the subject. The circumstances which have prevented any important measure being carried in the legislature are well known, and need not be further adverted to. With regard to popular feeling on the subject, the Council have found that during the greater part of the present session of the Society, the state of parties at home and of the foreign relations of the country, the dissolution of Parliament, the change of ministry, and the war now raging in Italy, have tended greatly to divert the attention of the community from the objects which this Association has in view. Notwithstanding, however, the occupation of the public mind with more exciting subjects, the Society has proceeded in its inquiries into the various questions that have been brought before it; and, except during a short

period immediately following the dissolution of Parliament, general meetings have been regularly held, while committees have sat on several subjects of much interest and importance.

UNANIMITY OF JURIES.

The first question which came before the Society during the present session, related to a point of great practical moment—viz., the unanimity of juries. During the last few years the question now referred to had begun to excite considerable attention, both amongst the public and in the profession. The increased intelligence of the classes from which jurors are taken; the higher moral tone, with regard to every matter of public duty, which now pervades the community; the change in the rules of evidence relating to interested witnesses and parties, which has left less to the mere conjecture of juries; and the general unwillingness of men at the present day to acquiesce in mere fictions and other similar contrivances of bygone times—have led to an increase in the number of cases in which jurors have been unable to agree on their verdict, and have caused the general question to be raised as to whether the present rule ought to be retained. The matter having been brought before the Society by Mr. Serjeant Woolrych, in a paper setting forth the advantages of unanimity, was referred to a committee, in which were several gentlemen of great experience both in civil and criminal trials. The committee reported in favour of retaining the present system in criminal cases, the principle of our law being that, before any man is convicted of a crime, such evidence should be adduced as will satisfy the minds of twelve jurors; but, with regard to civil cases, the committee were so equally divided that they resolved not to propose any resolution, or to report any definite opinion to the Society, but to leave the important question in the hands of members. When the report came on for discussion, great diversity of opinion was found to exist amongst members on the subject of the unanimity of juries in civil trials; and, after the matter had been considered at two meetings, it was finally resolved simply to receive the report of the committee. In

adopting this course, it appears to the Council that the Society exercised a sound discretion, as the question, looking to the greatness of the change proposed, can scarcely, at the present moment, be considered as ripe for decision; and they are strengthened in this view by the fate, in the House of Lords, of the bill which the present Lord Chancellor introduced, for abolishing the rule requiring unanimity in civil trials.¹ But, whatever may be the difficulties connected with the question of unanimity, there is one restriction relating to juries which the Council would recommend should at once be abolished—viz., the denial of meat, drink, and fire to juries who have retired to consider their verdict—a restriction opposed to all humane feeling and all enlightened reason. Another improvement which might be safely adopted would be to provide that, after deliberation for a certain number of hours, the jury, if at the end of that time they had not agreed on their verdict, should be discharged; and that upon such discharge the cause might be tried again as if no such abortive trial had taken place.

CONCENTRATION OF COURTS.

The next important subject which occupied the attention of the society, was the expediency of concentrating the courts of Common Law and Equity under one roof in the vicinity of the Inns of Court. At an early period of the session a committee was appointed to consider the subject. From the great importance of the matter with reference to the interests of suitors, and from its obvious connection with the due administration of justice, the society considered that the subject fairly came within the scope of its inquiries, and that the question had much more important bearings than the mere convenience of practitioners. The committee reported in favour of placing the whole of the superior courts and their offices in one locality; and in respect to the locality they thought that the site between Carey-street and the Strand, pointed out by Sir Charles Barry in his

¹ The bill was lost on the second reading; when there appeared for the bill, 7; against it, 23.

evidence before a select committee of the House of Commons, in 1845, would be the most appropriate. With regard to the means of defraying the expense of erecting courts in the above locality, they were of opinion that what has been called the Profit Fund¹ of the Court of Chancery might be made available for the purpose. The report was considered at a full meeting of the society, and was adopted with scarcely a dissentient voice. A general impression seemed to prevail amongst members that, with the view of carrying still further the fusion of law and equity which has now begun, and of introducing greater uniformity into the procedure by which these two systems are respectively administered, the different courts ought to be so situated as to afford the utmost facility of intercommunication. It was resolved by the meeting that the report should be referred to the Council, with instructions to take such immediate steps as might to them seem expedient to press the subject on the attention of the government and the legislature. In pursuance of this resolution the Council prepared a statement, in favour of a concentration of courts as recommended in the report of the committee, which was circulated extensively amongst members of the legislature. They also obtained, through the president, an interview with Lord Derby, at which the views of the society were fully explained to his lordship by a deputation from the Council. Lord Derby expressed himself strongly in favour of the scheme of concentration proposed, but said that the difficulty was with regard to the fund which had been suggested as applicable to the purpose. Speaking for himself only, he thought that the question of how far the fund was available, might properly be referred to a select committee of the House of Commons. Since the date of the interview, however, a royal commission has been issued to inquire into the subject, and the Council have appointed a committee to give evidence before the commissioners.

¹ This fund is composed of the income of the Suitors' fund, invested in consols, and amounts to above a million and a quarter. Suitors have no direct claim on this fund, their only claim being for the naked principal sums paid in, and which compose the Suitors' fund, properly so called.

BANKRUPTCY AND INSOLVENCY.

The subject of bankruptcy has, during the past session, occupied much of the attention of the society, and excited great interest amongst members. The late Lord Chancellor's Debtor and Creditor Bill, and Lord John Russell's Bankruptcy and Insolvency Bill, which were introduced during last session of Parliament, were discussed at two meetings of the Society, and many valuable suggestions offered by members on the subject to which these two bills related. The consideration of the bills was referred to the bankruptcy committee, who carefully weighed the leading provisions of the respective measures. As the committee felt themselves unable to agree with the principles on which either of the bills was framed, and as they considered it improbable that either of the measures in their then condition should receive the sanction of the legislature, they confined their report to a series of resolutions embodying their own views of what is desirable in a proper system of bankruptcy. These resolutions were afterwards brought before the Society, and have been in part discussed—their final consideration having been adjourned until the Bankruptcy Bills should again be brought before Parliament.

In the absence of any declaration of opinion on the part of the Society on several important questions involved in the resolutions of the Bankruptcy Committee, the Council would not desire to offer any observations on the comparative merits of the conflicting views which have been proposed in the Society and elsewhere. On many points connected with the amendment of the Bankruptcy laws, great uniformity of opinion prevails amongst all classes of the community. The expediency of diminishing, in some way, the present expense of procedure in bankruptcy, and the propriety of paying the retiring allowances and the salaries of judicial officers out of the consolidated fund, are generally admitted. Nor is there less unanimity with regard to the propriety of abolishing the distinction between trader and non-trader, and making all debtors liable to the same laws. But on the question, whether the present mode of winding up

estates by official assignees should be retained, irreconcilable differences of opinion exist; and it is scarcely possible that any measure should pass the legislature, whether altering the present system or leaving it as it is, which would not be considered as far from satisfactory by large and influential portions of the community. The legislature will, unquestionably, be put in a position of some embarrassment and difficulty when called on to decide between the clear and strong opinions of men best acquainted with the working of the present system in an official or professional capacity, and the views, no less clear and strong, of a large portion of the mercantile community, whose interests are deeply involved in having an efficient and economical mode of winding up the estates of bankrupts. On another point also—the extent of jurisdiction which should be given to the County Courts—considerable difference of opinion exists. On neither of the two questions last mentioned has the Society pronounced an opinion.

TRANSFER OF LAND.

Another important subject to which the attention of the Society was directed during the past session, was the mode of transfer of land proposed in the “Landed Estates Bill,” and the “Registry of Landed Estates Bill,” of the late Solicitor-general. The matter was brought before the Society by Mr. Edward Webster in an elaborate paper, in which the provisions of the bills were discussed, and exceptions taken to many of them. Various opinions were expressed by members on the merits of the bills, and a resolution was carried in favour of local registries. On this point, however, the Council would observe that a very important consideration has been suggested by the Liverpool Law Society in their publication on the subject of the bills above mentioned. Whilst strongly opposed on principle to a Metropolitan Registry, they say—“But the measure can only be regarded as an experiment, and its very limited applicability, and the gradual mode in which it must come into operation, are conclusive reasons why the registry cannot in the first instance be made local. It is impossible that a sufficient number of estates could be brought under the act, for some time to come,

to give sufficient work for local registries."—p. 37. But deserving of consideration as this observation is, it must still be borne in mind, that registries of titles to land might be made to apply not only to the registration of Parliamentary Titles for transfer, but to the transfer on the register of titles not judicially declared to be valid—in short, to all titles with regard to which the expense of a deed of conveyance is under the present system necessary; and, therefore, though it may be true that, for some time to come, a sufficient number of estates sold under a Parliamentary title would not be brought within the act to afford employment for local registries, yet it is not improbable that, for the purpose of transferring titles to land, registries would in a short time be fully occupied.

IMPRISONMENT BY COUNTY COURT JUDGES.

The subject of imprisonment by County Court judges has lately attracted considerable attention, and having been brought before the Society, was referred to a committee. It appears, from recent parliamentary returns that, during the year 1858, no less than 11,501 persons were committed to prison for an average period of twenty days each, by warrants issuing from County courts, in many cases for debts not exceeding 40s., and in some for less than half-a-crown; and that, of these, 8361 were so committed simply for non-attendance in obedience to the judgment-summons issuing under sect. 98 of the County Court Act of 1846. In these last cases no investigation in general takes place as to the conduct of the debtor in contracting the debt, his dealing with his goods, or his ability to pay, but the order for commitment is at once made, upon proof of personal service of the summons, and ascertaining the bare fact of the debtor's non-attendance. The committee of the Society have reported in favour of putting an end to imprisonment where the debt is under 40s., and to imprisonment for non-attendance where no ground is proved by the creditor for commitment; and also of providing that not more than one imprisonment should be allowed for the same debt. The Society has not yet pronounced an opinion on the changes recommended by the committee.

FALSE PRETENCES.

At an early period of the session a letter from the president was read to the Society, in which the unsatisfactory state of the law with regard to false pretences on the sale of goods was pointed out. The letter was referred to the Criminal Law Committee, and the subject was carefully considered by them. Although their report has not yet been formally brought before the Society, its substance has been stated by Mr. Hastings at a recent general meeting. According to that statement, the committee had found great difficulty in coming to a decision, as to whether the law of false pretences should be extended to cases of sales of goods where there was a fraudulent representation as to *quantity* or *quality*; but, on the whole, they were of opinion that where there was a false statement in these respects, with intent to defraud, it ought to be an indictable offence. The subject is well deserving the attention of the Society, and will no doubt receive their full consideration when brought before them.¹

LAW OF LUNACY.

Among the subjects which have been referred to committees, but have not yet been reported on, the Council would mention the law of lunacy. The committee appointed on this subject had made considerable progress in its inquiry into the defects of the present system, both with regard to lunatic patients in public and private asylums, and Chancery lunatics, when it was agreed to defer the further consideration of the matter until the Select Committee of the House of Commons should have issued their report. The labours of the Select Committee having being cut short by the dissolution, the evidence which had been taken was printed; but the Committee has been re-appointed during the present session, and further evidence will be taken. As soon as their final report has appeared, the committee of the Society will resume its inquiries.

¹ Since the Annual Report was read, the report of the Criminal Law Committee on the matter above referred to has been brought before the Society. The report was received and ordered to be printed, and will be further discussed during next session.

CORONERS' COURTS.

Another subject of great importance, on which a committee of the Society is still engaged, is that of Coroners' Courts. The question was brought before the Society by Mr. Dempsey, in a paper offering a variety of suggestions for re-modelling the whole system pursued in this ancient and useful court, and for extending the duties of the coroner. Among the few measures of law amendment which passed during the last brief session of Parliament, was an act to enable coroners to take bail in cases of manslaughter, the evil arising from the inability of the coroner in such cases having been forcibly pointed out by Mr. Wakley at the meeting of the Society at which the paper now mentioned was read.

CONSOLIDATION.

Among the papers read before the Society which have not yet been referred to, was one by Mr. E. Webster on the Consolidation of Judicial Decisions. It was resolved that the paper should be taken into consideration at a future meeting of the Society, and notice of certain resolutions in accordance with the paper was given. The object of these resolutions was to take the opinion of the Society as to the expediency of discontinuing the present Statute Law Commission, and establishing in its stead, with the authority of the legislature, a duly qualified Board of Commissioners, whose exclusive duty should be the preparation, for the consideration of the legislature, of a digest of the whole body of the law, both written and unwritten. The Council having contemplated holding a public meeting on the subject of the consolidation of the statutes, it was considered desirable that the resolutions should be brought to the notice of the Society at that meeting, the matter being one of much public importance. The political events, however, to which reference has already been made, have prevented the proposed meeting being held; but, from the great interest which the Society has always taken in the question of consolidation generally, and from its great importance with reference to the amendment of the law, the Council will feel it to be their duty

to watch for every favourable opportunity of bringing the matter to the attention of the legislature and the public.

In connection with this subject, the Council would state that they have much pleasure in learning from the recent report of the Statute Law Commission, that that body is now directing its efforts to the preparation of a register of existing statutes. On the merits of the particular mode of registration adopted by the Commission, the Council would not at present express any opinion, but would merely advert to the fact, coupled with the circumstance of no bill prepared by the Commission having yet received the sanction of the legislature, as fully justifying the views expressed by a Committee of this Society nearly four years ago, as to the necessity of a complete expurgation of the statute-book before proceeding to the work of consolidation. They would also mention that the example of the state of New-York in the consolidation of its statutes, then appealed to by the Committee, has been referred to by the Commission in favour of the course which they have at length thought proper to adopt.

ARTISTIC COPYRIGHT.

Among the papers submitted to the Society during the session, was one by Mr. Edgar, on the law relating to artistic copyright, in which the defects of the existing system with regard to the protection of the rights of artists, the assignment of copyright, and the legal proceedings by which redress may be obtained for piracy, were pointed out.

EXECUTORS AND TRUSTEES.

A valuable paper was also read by Mr. Harris, on the present position of Executors and Trustees, and offering suggestions for a provision for their relief. The plan proposed was, that all trustees who desire an investigation into the state of the trust fund, and all *cestuis que trust* who are dissatisfied with the administration of the trust estate, might, on petition to the Court of Chancery, have an investigation conducted in London before one of the masters, or one of the chief clerks belonging to the Court of Chancery, or in the country before one of the registrars of the Court of Bankruptcy ; and which master, chief

clerk, or registrar, should make a report of the condition of such trust estate, and direct such proceedings to be taken for correcting errors, with regard to administration, as should appear desirable. The Society has not yet had an opportunity of considering the merits of the scheme now mentioned.

DIVORCE COURT.

An important communication was made to Lord Brougham at an early period of the session, with regard to what appeared to his Lordship a defect in the Divorce and Matrimonial Causes Act, viz., the absence of any sufficient security against the frauds which may be practised by parties acting in collusion to obtain a divorce. The subject has not yet been considered by the Society, but after the experience of the working of the new system which has now been obtained, it will be desirable, if no provision be made in the meantime by the legislature, that the matter should be investigated by the society during next session.

LEGAL EDUCATION.

On the subject of legal education, the Council have much pleasure in stating that the Committee of the Inns of Court have reported to the benchers of the several societies in favour of an examination of students previous to admission to an Inn, and also in favour of a compulsory examination of students previous to being called to the bar. On the necessity of such examinations the Society has on several occasions expressed a strong opinion; and the Council earnestly hope that the benchers will agree to adopt the above, together with the other recommendations contained in the report referred to.

In connection with this subject, the Council would also state that a resolution was carried after considerable discussion at a general meeting of this Society, recommending the abolition of the present rule of the different Inns of Court, requiring the names of attorneys to be struck off the rolls for three years before being called to the bar,

Although the Council have not the slightest hope of any important measure of law reform being carried during the present

session of parliament, and although the state of popular feeling on the subject is for the present discouraging, it would yet be unwarrantable to have the smallest fear for the progress of that cause for which this Society has now laboured for sixteen years. The advantages which have resulted from those amendments of the law which have already taken place, have been so manifest, that no apprehension need be entertained that other and further improvements in our legal system will not be adopted as soon as the political circumstances of the country will permit. The magnitude of some recent changes in that system—such as the establishment of the new Probate and Divorce Courts—which, though long delayed, were yet successfully carried at last, shows the height to which the tide has risen, and the force which it has acquired; nor is there any reason to doubt that it is still flowing, although the present is the period of the recoil of the wave. Subject, however, as the cause of law amendment must always more or less be to temporary checks, it is of great advantage to have such a Society as ours, pursuing its inquiries in season and out of season, and offering a continuing protest against all unjust and unequal laws. By its publications and meetings for the discussion of important questions; by the great authority and influence of its president; by the zeal and energy of many of its supporters, labouring in the various fields of inquiry which it embraces; and by its very list of members comprehending names from every influential class in this great and free community, it will still keep the cause alive through all political vicissitudes, and prepare the public mind for the wise and beneficial measures that are to be adopted in happier times.

II.—ON THE PRESENT POSITION OF EXECUTORS AND TRUSTEES ; WITH SOME SUGGESTIONS FOR AN EQUITABLE PROVISION FOR THEIR RELIEF. By GEORGE HARRIS, Esq., Barrister-at-Law.

THE attention of this Society has several times been called to the state of the law as it affects executors and trustees ; but mainly as regards the opportunities afforded to dishonest and fraudulent trustees to mis-appropriate the property intrusted to them, on the one hand ; and, on the other hand, as regards the perils to which trustees who are honestly disposed, and desirous to act fairly, are but too frequently exposed. In consequence of a paper which was some time ago written by our noble president, pointing out in a very forcible manner the evils which arise from the defects of our law as regards the former of these considerations, a committee of this society was appointed on the subject, who, after very careful consideration of the whole matter, drew up a report, embodying their views and recommendations. As regards the provisions which ought to be adopted, in order to restrain the misappropriation by trustees of trust property committed to their charge, the committee recommended that such an act, when fraudulently perpetrated, should be brought within the provisions of the criminal law. This suggestion has since been adopted by the legislature, and is now the law of the land.

As regards the perils to which trustees, who are honestly disposed and desirous of acting fairly, are very frequently exposed, the committee recommended that facilities should be afforded for an investigation into the condition of the trust estate before proper tribunals for the purpose, so that trustees who are acting improperly might be restrained in their proceedings, and the trust estate saved from ruin ; while those trustees who desire to act fairly would be directed aright in cases where they had erred, and prevented from following an erroneous course ; and those trustees whose conduct is proved to have been in all respects satisfactory, as regards their administration and investment of the trust fund,

would receive a certificate exonerating them from all liability on account of their trusteeships. No measures whatever have, however, been adopted by the legislature as regards the relief of trustees, and enabling them to obtain an investigation into the state of the trust. They are, therefore, now placed, in reality, in a much worse position than they were before, being threatened with criminal proceedings in addition to the harassing litigation which an error in judgment, or a mistake on the part of their advisers, frequently arising more from the uncertain and anomalous state of the law than from any want of skill, or learning, or caution on their part is almost certain to entail upon them.

It is quite unnecessary to urge on this society how very unsatisfactory is this state of things, and how imperatively it calls for a remedy of some kind being applied to it. Families are exposed to ruin both on account of their own property having been vested in trusts which are unskillfully administered, and also from certain members of such families having unconsciously acted erroneously in the discharge of trusteeships. The ultimate consequence must be, that no persons of property or character will be found to take upon themselves the onerous, thankless, and dangerous office of trustee, which must, therefore, be left to devolve upon those who are either wholly ignorant of its duties and responsibilities, or whose sole object in undertaking it is to make an improper use of the funds which are thus placed at their disposal.

Various measures have been proposed, from to time, both by this society and in other quarters, for remedying the evil complained of, the magnitude of which is on all sides admitted. The plan of official trustees has been on several occasions discussed, and has, doubtless, much to recommend it.

Two objects appear to me to be mainly requisite, and, indeed, it is at the attainment of these which all the plans which have been proposed, alike seek to arrive. The first of these is, an investigation, without the expensive and tedious process of a suit in Chancery, into the actual condition of the trust estate, more especially as regards the investments which have been made of trust pro-

perty, and by obtaining which, wrongful acts, which are in progress, may be stopped, and both the estate, and the trustees of it, rescued from litigation and probable ruin. The other of these objects is the discharge from liability, and from the risk of future litigation and loss, of those trustees who have properly discharged their trust, or who desire to act fairly and honestly.

The difficulties, however, of obtaining any legislative enactment for this purpose—especially at the present time, when so many important measures are pressing upon parliament, though none of them in reality of half the consequence to the security and comfort of every individual in the community as is that now under consideration—appear to me to be almost, if not wholly, insurmountable. What I wish, therefore, to submit to the candid consideration of the learned members of the Law Amendment Society is, whether an initiatory measure—and which may possibly, I hope I may say probably, eventually lead the way to an Act of Parliament being adopted, and which would, at all events, be useful as an experimental measure—might not at once be adopted by an order of the Court of Chancery (should the Lord Chancellor coincide in the opinion here entertained as to the desirableness of such a proceeding), directing that all trustees who desire an investigation into the state of the trust fund, and all *cestuisque trust* who are dissatisfied with the administration of the trust estate, may, on petition, have such investigation conducted before one of the masters, or one of the chief clerks, belonging to the Court of Chancery in London; or before one of the registrars of the Court of Bankruptcy in the country; and which master, chief clerk, or registrar, shall make a report of the condition of such trust estate, and direct such proceedings to be taken for correcting errors, with regard to its administration, as should appear desirable.

Such a proceeding, it may be objected, will not have the effect of discharging a trustee from liability; but it will frequently accomplish what is more important still, by rescuing him from an erroneous course of proceeding, and directing him into a right path, so that the necessity for a discharge from liability will no

longer exist. In fact, instead of guarding against the liability, the liability itself would be removed. It will also be a satisfactory record of the trustee having discharged his duty aright, and may be referred to as such, when the estate has been properly administered. On the other hand, where a trustee is acting improperly, and refuses to submit to this inquiry, the *cestuique trust* will have thereby ample warning that their property is in peril, and that they must adopt means for its rescue.

That something is now required to be done, is admitted by all who are conversant with the subject. But as we cannot obtain at once a legislative measure, why not endeavour to obtain a remedy of another kind, which appears practical in itself, and may have the effect of allaying, to a large extent, the evil of which the complaints are now so general and so just? Should the experiment thus tried be found to answer, it would probably form the basis of a comprehensive, and I trust, efficient legal enactment that would deal fully with this question, which is one of vital importance to the whole community.

THE BAR EXAMINATION QUESTIONS.

TRINITY TERM, 1859.

Questions by the Reader on Constitutional Law and Legal History.

1. At what era of our history is the right of every man detained in prison to a trial a clear principle of our constitution?
2. What was the limit which the charter of Henry the Third fixed to the amount of a fine?
3. What is the first instance of parliament giving a conditional assent to the demand of supply?
4. What is Bracton's view of the prerogative?
5. When were justices of assize first instituted?
6. When were writs of summons first issued to cities and boroughs?
7. When did deputies of cities and boroughs finally become an integral part of the legislature?
8. What events important to our constitutional history happened during the reign of Richard the Second?

9. What is the earliest authority in favour of the right of the House of Commons to originate money bills?

10. What is the earliest assertion of the doctrine that the king ought not to take notice of matters pending in parliament?

11. Mention any instance in which this constitutional rule was violated.

12. Give an account of the manner in which secular peerages were created at the accession of Henry the Fourth.

13. What was the origin of the court of high commission as it existed in the time of Charles the First?

14. What was the case of *Bates*, in James the First's time?

15. Give an account of the case of *Cavendish*, in the reign of Elizabeth.

16. Mention any instances in which the right of impeachment was exercised by the Commons in the reign of James the First.

17. When were feudal tenures finally abolished?

18. State the date and purport of the Act of Settlement.

19. Give an account of the causes which led to the trial of *Sacheverell*, and of the principles it established.

Equity.

1. A sufficient answer to a bill having been filed, what are the courses which are open to the plaintiff? Mention the advantages and disadvantages attendant upon each.

2. What is meant by the expression that a suit is abated? Can an abatement be partial? In what manner is an abatement remedied according to the present, and in what manner was it remedied according to the former, practice of the court?

3. With what view is a plaintiff empowered to enforce an answer to interrogatories from a defendant? No interrogatories having been filed by the plaintiff, is it ever, and when, expedient for the defendant that he should file an answer to the bill?

4. A bill is filed by A. to set aside a sale by his trustee to B., on the ground that it constituted a breach of trust. B. files a plea, alleging simply that he is a purchaser for valuable consideration. A. replies to the plea, which is proved to be true. What will be the result of the suit?

5. A. dies intestate, leaving a wife, a first cousin, and a great nephew, but no issue or other relations. In what manner shall A.'s personal estate be divided? State the general rules applicable to the case proposed.

6. A., who is entitled to certain railway shares standing in his name, enters into a written contract with B. for the sale of the shares to him; B. refusing to perform his contract, can A. maintain a bill praying that B. may be decreed to accept a transfer of the shares and to pay the purchase-money?

7. By a post-nuptial settlement A. conveys a freehold house, of which he is seised in fee, to trustees, upon trusts for the benefit of his wife and children. He also, by the same instrument, declares that he stands possessed of a sum of stock standing in his name upon the like trusts. Subsequently, for valuable consideration, A. transfers the stock to B., and also for valuable consideration executes a deed purporting to convey the house to him. B., at the time of the consideration paid, has notice of the settlement. Have the wife and children of A. a remedy to any and what extent against B.?

8. Explain what is meant by the expression "marshalling assets." A legacy having been bequeathed to a charitable institution, will the doctrine of marshalling be applied in favour of the legacy? State the grounds on which the court proceeds in such cases.

9. A freehold estate is devised to A. and B. and their heirs. They take possession of the land, purchase stock (for the payment of which they contribute equally), and carry on the business of farmers upon the land. A. dies about twelve months afterwards, and before any settlement of accounts has taken place. The personal representative of A. requires that the land should be sold and the proceeds equally divided between himself and B. Can this claim be enforced?

10. An estate is settled upon A. for life without impeachment of waste, remainder to B. for life, remainder to C. for life, remainder to D. in fee. A. cuts down ornamental timber on the estate, and threatens to cut down more. Is C. entitled to any and what relief in respect of the waste committed and to be committed; 1stly, at law; 2ndly, in equity?

11. A. lends B. a sum of money, the repayment of which is secured by the joint bond of B. and C. B. dies, the debt still remaining unpaid. C. then pays off the bond. Has C. any and what demand against the estate of B.? Has any change recently taken place in the law on this subject?

12. A., by his will, after directing that all his debts shall be paid, gives a freehold estate to B., upon trusts for sale and division of the proceeds between C. and D.; but the will does not expressly empower B. to give a receipt for the purchase-money. Can a purchaser safely dispense with the concurrence of C. and D. in the conveyance?

13. A. mortgages an estate to B. C. afterwards obtains judgment in an action of debt against A. in one of the superior courts, and the judgment is duly registered. D., without notice of C.'s judgment, then also obtains judgment in a similar action against A., and the second judgment is likewise registered. D. afterwards pays off B.'s mortgage and takes a conveyance from B. Which of the two judgments is entitled to priority?

14. A. bequeaths £1000 to B., upon trust for C. B. is also trustee under a deed of settlement, by which he declared that he would stand possessed of a sum of £500, upon trust for D. B. appropriates both sums to his own use, and dies possessed of personal property to the value of £750 only, and of no real property. He is at his death under no liabilities except those arising from the breaches of trust. A suit being instituted for the administration of his estate, claims are brought in on behalf of C. and D. How shall the assets be applied?

15. A., a *feme sole*, is lessee of certain lands for a term of years. Other lands are vested in B. for a term of years as trustee for A.: and a sum of stock is standing in B.'s name, upon trust to pay the dividends to A. for life. A. marries without settlement, and afterwards concurs with her husband in mortgaging all her leasehold property and her interest in the stock. The mortgagee files a bill to enforce his security, but A. (who resides with and is supported by her husband) insists on her equity to a settlement. Will her claim be successful to any and what extent?

16. A. mortgages an estate to his bankers as a security for a balance then due to them from him, and for any future advances which they may make on his account. A. then mortgages the same estate to B., who has no notice of the bankers' security. They, with notice of B.'s security, afterwards make further advances to A. Are the bankers entitled as regards these advances to priority over B.'s mortgage?

17. A married woman has an estate for life, for her separate use, in a sum of stock, and she has a general power of appointment by will over the stock itself. She signs several promissory notes for good consideration, bequeaths the stock to her children, and dies. Are the holders of the notes entitled to be paid out of the stock?

18. A. conveys an estate to B. "in consideration of B. entering into the covenant thereafter contained"—that is to say, a covenant by B. to pay A. an annuity for the life of A. The annuity falls into arrear, and B. dies insolvent. Has A. any remedy against the estate?

NOTE.—Where an opinion is required and given, the reasons on which it is founded must also be stated. It is not essential that authorities should be quoted, but whenever they are remembered, this should be done.

On the Common Law.

1. Explain what is meant by an "executed consideration." And show how the rule is to be understood, that "an executed

consideration," even when moved by an antecedent request, will support no promise other than such as the law may imply.

2. What were the facts in *Collins v. Blantern*, and what principle is deducible from that case?

3. What do you understand by a plea of "accord and satisfaction?"

4. What is the meaning of the term "accommodation bill?" What liability does the acceptor of such a bill incur towards the drawer? and towards an indorsee?

5. What is the duration of an ordinary writ of summons? And when should it be specially indorsed?

6. What is put in issue by pleading "non assumpsit" to a declaration on a special contract?

7. Distinguish between a *judicial* and an *extra-judicial* confession. State the principal limitations to the admissibility of the latter in evidence against an accused.

8. Mention various modes in which a civil injury may be redressed by the mere act of the party aggrieved.

9. What provision is contained in the Common Law Procedure Act, 1854, having reference to an action upon a bill of exchange or other negotiable instrument which has been lost?

10. How may evidence of an act or a declaration, not otherwise admissible, sometimes be so, as forming part of the *res gestæ*?

11. Cite cases illustrating the rule that "a plaintiff is not entitled to recover in respect of any damage that is *too remote*."

12. How are the requirements of the 17th section of the Statute of Frauds ordinarily complied with, so that the purchaser of a chattel at a sale by auction may be bound?

13. State the period of limitation in an action of (1) detinue, (2) trover, (3) trespass for assault, (4) case for slander.

14. How does a demurrer differ from a plea? Is it competent to a party to plead and demur to the same pleading?

15. What statutory provision is now in force regulating the joinder of different causes of action in the same suit?

16. What time is allowed for pleading in bar? and in abatement?

17. Define the offence of murder—and of manslaughter—and state the form of indictment in either case.

18. What point was decided in *Dalby v. The India and London Life Assurance Company*? and what earlier decision was overruled by that case?

19. In what respect does a *pawn* differ from a *lien*? and from a *mortgage*?

20. Explain fully the rule of our Common Law, that "a chose in action is not assignable." Specify various exceptions—statutory or otherwise—to this rule.

21. How may a non-joinder of plaintiffs be amended *before* trial?

22. Illustrate the doctrine of estoppel by reference, (1) to the judgment of a Court of Record, (2) to a bond, (3) to a bill of exchange.

On the Law of Real Property.

1. Into what two broad divisions is property in England divided? To which of those divisions will the following interests in land belong:—a term of 1000 years; a term of 99 years, if A. B. shall so long live; an estate for one's own life; an estate for the life of another person; an estate during the widowhood of a woman; the next presentation to a living?

2. What words used in a will governed by the old law of wills would pass the fee-simple of land to a devisee without words of inheritance? What is the new law on this point?

3. What length of title to real estate can be demanded by a purchaser on an unrestricted contract? When is a title held to be "marketable?"

4. Where is the legal estate in the following limitations respectively:—1. Bargain and sale to or in favour of A. B. and his heirs, to the use of C. D. and his heirs. 2. Covenant to stand seised in favour of A. B. and his heirs, to the use of C. D. and his heirs. 3. Feoffment or grant to A. B. and his heirs, to the use of C. D. and his heirs. 4. Appointment (under a power) to A. B. and his heirs, to the use of C. D. and his heirs? Give the reasons for your answers.

5. There are a few cases in which technical words are absolutely necessary in assurances of real estate. What are those cases?

6. Classify assurances under the heads "tortious" and "innocent." Explain these terms, and state how and by what means the distinction has been abolished.

7. Can property be so settled upon a male in any, and, if any, what mode, that his creditors may have no claim either upon the corpus or the income?

8. What acts may tenants for life, impeachable and not impeachable for waste, do or permit in respect of the dealing with or management of the settled estate?

9. What property may, and what may not be legally given by will for charitable purposes? What is the best form of gift for that purpose? If a testator simply gives a legacy of £1000 to a charity, and dies leaving a freehold estate worth £5000, and consols worth £4000, what is the result as to the charitable legacy?

10. Late cases have shown that it is possible for a testator to evade the prohibitions of the so-called Mortmain Act. State the

plans adopted in the cases referred to, and explain the principle upon which the devises were upheld.

11. Under what circumstances may a purchaser, even with notice of a prior objection to title, obtain a good title?

12. Who are the necessary parties to a deed barring an estate tail created by an ordinary marriage settlement? What additional ceremony is necessary for the perfecting of the disentailing deed? B, being mortgagee in fee of A's estate, dies intestate: who are the necessary parties to a re-conveyance or transfer of the mortgaged property, and for what reasons?

13. What are "springing uses" and "shifting uses" respectively? Give examples of each class, and show in what way they do not conform to the common law.

14. Define a contingent remainder, and give the three modes in which it might formerly have been destroyed. What is the effect of a late act upon the destructibility of contingent remainders?

15. Explain the doctrine of tacking. What debts may be tacked by a first mortgagee having the legal estate, and against what persons?

16. State the rule of Equity with respect to the marshalling of securities as between the mortgagees and incumbrancers of the same mortgagor.

17. Give instances in which the person entitled to the first charge upon an estate has lost the benefit of that charge by the effect of merger.

18. How are powers operating under the Statute of Uses divided? Which of those powers may, and which may not, be released or extinguished by the act of the donee?

19. In what cases do executors take an implied power to sell a testator's real estate? and if in those cases one of the executors named dies, can the survivors sell, and make a good title to the real estate?

20. If the donor of a power wishes the discretion in the donees to be transmissible, what is the best form of such a power?

Jurisprudence and the Civil Law.

1. What was the probable origin of the Prætor's edictal jurisdiction? Give a brief account of the principles on which it was ultimately exercised.

2. Assuming that the *jus honorarium* of the Romans corresponded with the equity of the English Court of Chancery, explain how it was that law and equity were administered by the Roman tribunals without a conflict of jurisdictions.

3. Illustrate the distinction between *res mancipi* and *res nec*

mancipi, by analogous distinctions in our own and any other jurisprudence. When Justinian put an end to this distinction, what other changes did the step taken by him inevitably entail?

4. Define an obligation, and explain what is meant by saying that, in Roman law, an obligation includes the right as well as the duty.

5. What external solemnities does the modern civil law require in a valid testament? Can a codicil be executed with fewer or different solemnities?

6. To what extent does the Roman law forbid the disinheritance of children by will? How far are its provisions extended in the Code Napoleon?

7. How far does the relation of fiduciary and fidei-commissary heir, and of fiduciary and fidei-commissary legatee, resemble that of trustee and *cestui que* trust under English law? When Justinian attached to legacies the qualities of *fidei-commissa*, in what did the importance of the change consist?

8. Under what circumstances does Roman law permit a bequest to be made of the following:—(1) Things belonging to the heir. (2) Things belonging neither to the testator nor to the heir. (3) Things not in existence. (4) Things once belonging to the testator, but alienated by him before death?

9. What was the Heir's Falcidian portion? What was the policy of the Falcidian statute and of those enactments, having the same object, which preceded it?

10. What rules are followed as respects impossible conditions, when they are inserted—(1) in testaments; (2) in contracts?

11. At what moment is a Roman contract of sale complete, and what obligations between vendor and vendee arise immediately on its completion?

12. What are the rights and duties of co-sureties under Roman law, (1) by the *jus civile*, (2) as modified by Imperial Constitutions?

13. Define a quasi contract, and state which of the essential ingredients of a true contract is wanting in it.

14. How do the English and Roman law differ as respects the rights of the *bonâ fide* possessor of another man's property?

15. Explain the meaning and application of the following maxims and rules:—

(1.) Proximus est cui nemo antecedit; supremus est quem nemo sequitur.

(2.) Nemo potest mutare consilium suum in alterius injuriam.

(3.) Non solet deterior conditio fieri eorum qui litem contestati sunt, sed plerumque melior.

(4.) Rapienda occasio est quæ præbet benignius responsum.

(5). *Fraudis interpretatio semper in jure civili non ex eventu duntaxat sed ex consilio quoque desideratur.*

General Paper.

1. Trace the progress of party during the reign of Charles the Second.

2. Give an account of the law of treason from the time of Edward the Sixth downwards.

3. Give an account of the influence of the crown in the balance of the constitution from the reign of Edward the First to the revolution of 1688.

4. An estate is conveyed to A. and his heirs, upon trust for B. and his heirs. A. is attainted of felony, and dies intestate. B. afterwards dies intestate, and without heirs. To whom shall the land belong?

5. A., by settlement made on his marriage, covenants with trustees to lay out £10,000 in the purchase of lands, and to settle them on himself for life, with remainder to his wife for life, with remainder to the sons of the marriage successively in tail, with remainder to his own heirs. The wife dies in the lifetime of the husband, without ever having had issue: then the husband dies intestate. Soon after the marriage he had laid out £4,000 in the purchase of lands, which were conveyed to himself and his heirs, and so stood limited at his decease. A.'s heir claims the land purchased, and £10,000 out of A.'s personal estate. To what is the heir entitled?

6. A fund is settled upon trust for such of the tenant for life's children, and in such shares as he shall appoint, and, in default of appointment, for the children equally. He has two daughters, and appoints the whole fund to one, on an understanding, but not an absolute agreement, that she will settle a moiety on her sister for life, with remainder to her sister's children. The settlement is executed by the appointee accordingly, and without the knowledge of her sister. The father then dies. Is the settlement unimpeachable?

7. Specify various exceptions to the rule, that "there is no implied warranty of title in the contract of sale of a personal chattel." In what recent cases has this rule been discussed?

8. A customer, entering a shop, sees lying on the floor a roll of bank-notes, which he picks up and afterwards hands to the shopkeeper, with express instructions to find out, if possible, the owner of the notes, and restore them to him. The shopkeeper fails in discovering the owner; and when, after the lapse of some months, the notes are demanded of him by his customer, refuses to give them up to him. Which of these parties (the shopkeeper

and the customer) has the better right to the notes? Explain fully the grounds of your opinion.

9. What view does our common law take of the case where a bailee of goods, without breaking bulk, fraudulently converts them to his own use? And what change has been made in it by a recent statute?

10. Trace and explain the changes in the common form of transfer of corporeal hereditaments from a period prior to the passing of the Statute of Frauds down to the present time.

11. Contrast the old and new law of wills on the following points:—1. The execution and revocation of wills. 2. The time from which a will speaks. 3. The expressions necessary to exercise a general power. 4. The construction of the words “die without issue.”

12. Explain the different rules by which trusts for sale and powers of sale, with reference to their devolution and transmission, are interpreted.

13. Is there any rule against perpetuities in Roman law? Give reasons for your answer.

14. It is a maxim of Roman law that no man can give to another a better title to property than he enjoys himself. State how this rule can be reconciled with the principle of *usucapion*, and whether it obtains in English law.

15. In what way has the feudal element in modern jurisprudence affected the provisions of Roman law in respect of *res nullius*?

The studentship and certificates were awarded as follows:—A studentship of fifty guineas per annum, to continue for a period of three years, was awarded to James Anstie, Esq., of Lincoln's-inn.

Certificates of honour of the first class were awarded to:—Joseph George Long Innes, Esq., of Lincoln's-inn; Lewis William Cave, Esq., of the Inner Temple; and Thomas Edward West, Esq., of the Inner Temple.

Certificates of having satisfactorily passed a public examination were awarded to:—Lionel Uniacke Steele, Esq., of Gray's-inn; George Lea, Esq., of the Inner Temple; William Neish, Esq., of Lincoln's-inn; William Bradford, Esq., of the Middle Temple; Michael Richard Barry, Esq., of Lincoln's-inn; Henry Stewart Cunningham, Esq., of the Inner Temple; Robert Greenoak, Esq., of the Middle Temple; William Flood Yates, Esq., of the Inner Temple; James Lowe, Esq., of the Middle Temple; Thomas Nottidge, Esq., of Lincoln's-inn; Joshua Strange Williams, Esq., of Lincoln's-inn; and De Castro F. Lyne, Esq., of the Middle Temple.

THE FIRST REPORT OF THE COMMITTEE OF THE FOUR INNS OF COURT, APPOINTED TO RECONSIDER THE WHOLE SUBJECT OF LEGAL EDUCATION.

To the Benchers of the several Societies of Lincoln's Inn, the Inner Temple, the Middle Temple, and Gray's Inn.

MY LORDS AND GENTLEMEN,—I am directed by the committee of the four Inns of Court, appointed to reconsider the whole subject of legal education, to report to you that the committee, having entered upon their duties and held numerous meetings, have passed the following resolutions:—

1. That it is expedient there should be an examination of students previous to admission at the Inns of Court.

2. That it is expedient there should be a compulsory examination of students previous to being called to the bar.

3. That the attendance of students at lectures be no longer compulsory.

4. That it is expedient that no person be appointed to examine candidates for admission to the bar who has been engaged in giving lectures or private instruction to any of such candidates within two years before such examination.

A sub-committee was appointed by the committee, to report “on the proper mode of carrying into effect the resolution as to a preliminary examination of candidates for admission to the Inns of Court; and also, whether any and what exceptions should be made in such examination; and further, to report on the proper mode of carrying into effect the resolution, that there shall be a compulsory examination previous to being called to the bar.” The sub-committee was constituted of the chairman and eight members of the committee, and made their report to the committee on the subjects referred to them on the 9th day of May. This report was taken into consideration by the committee, and, having been in some respects amended, was finally approved of and confirmed. The resolutions contained in such amended report are to the effect following:—

On the Subject of the Preliminary Examination of Students previous to admission at an Inn of Court:—

1. That every person who shall have passed a public examination at any of the Universities within the British dominions, be exempt from preliminary examination.

2. That the subjects of examination be as follows :—
 - (a) The English and Latin languages.
 - (b) English history.
3. That the examination be conducted by a joint board, to be appointed by the four Inns of Court.
4. That, for constituting such board, each Inn do appoint six examiners.
5. That the examiners do attend according to a rota to be fixed by themselves, and that two be a quorum.
6. That meetings of the examiners of students applying for admission at either of the four Inns of Court be held at least once every week, between the 20th October and the 10th August in each year.
7. That every student shall pay the sum of one guinea upon application for the form of admission.

On the Subject of Examination of Students previously to their being called to the Bar:—

8. That the examination shall include, at the option of the candidate, examination for honours as well as for certificates of sufficiency for call to the bar.
9. That the examination shall be the act of the four Inns jointly, and conducted by examiners appointed for that purpose by the four societies.
10. That the examiners be selected from the barristers, and that no benchers shall be an examiner.
11. That the examinations for pass certificates shall be held four times a year, but examinations for honours twice only in each year.
12. That the subjects for the examinations of students desirous of being called to the bar shall be divided into two branches, consisting of the following subjects :—
 - First branch—
 1. Constitutional law and legal history.
 2. Jurisprudence, especially private and public international law.
 3. Roman civil law.
 - Second branch—
 1. Common law.
 2. Equity.
 3. The law of real property.

13. That no person shall be called to the bar unless he shall have received a certificate from the board of having passed a satisfactory examination, in at least one subject in each of the above branches.

14. That the candidates for honours shall pass a satisfactory examination in all the subjects of the above branches.

Generally.

15. That there be a superintending board, consisting of two benchers from each Inn of Court, for regulating the examinations, and giving such directions respecting the same as may from time to time be required, and that any three of such benchers be a quorum.

16. That the superintending board have power to give such directions as may from time to time be necessary as to the conduct of the examinations.

I have the honour to be, your faithful and obedient servant,

RICHARD BETHELL, *Chairman of the Committee.*

COUNCIL CHAMBER, LINCOLN'S INN,
27th May, 1859.

Notes of Recent Leading Cases.

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1. *ESPIN v. PEMBERTON*, 28 L. J. Chanc., (V. C. KINDERSLEY) 308 & (L.C.) 311; 4 Drew., 333.

Equitable and Legal Mortgages—Solicitor and Client—Notice—Negligence—Priority.

In 1855, the defendant Pemberton, a solicitor, borrowed of Espin, the plaintiff, a sum of £300, and, by way of security, deposited with Espin the lease of a house in Southampton-street, Bloomsbury, and the assignments of the same, and delivered to him a memorandum, whereby Pemberton agreed to execute an assignment of the premises to Espin, on being required so to do by him. In the month of April, 1857, Browne, a defendant, the stepson and articled clerk of Pemberton, lent Pemberton a sum of £1500, and on the 8th September, 1857, Pemberton assigned the house in Southampton-street to Browne (who was then ignorant of the security to Espin) as a security for £500, part of the sum of £1500. At the time the assignment was executed, Browne, for whom no separate solicitor acted, requested Pemberton to hand over to him the title-deeds; and subsequently he repeatedly asked for the deeds, but was informed by Pemberton that they were mislaid, and that he should have them when they could be found.

The questions raised on this state of facts were:—first, whether Pemberton must be considered as having acted as

Browne's solicitor; and, inasmuch as Pemberton knew of the previous equitable mortgage to Espin, whether there was constructive notice of the same to Browne; and secondly, whether there was such negligence on the part of Browne, in not asking for the title-deeds, as to postpone his legal estate to Espin's equitable security.

With respect to the first question, Kindersley, V.C., said:—
“In the case of *Hewitt v. Loosemore* (9 Hare, 449), it appears that Lord Justice Turner, then Vice-Chancellor, came to the conclusion, in a similar case to the present, where a mortgagor was himself a solicitor, and no solicitor was acting for the mortgagee, that there the mortgagor *quà* solicitor was to be considered as solicitor of the mortgagee. I confess I think I am bound to state, that if it were not for the opinion expressed in that case, I doubt whether I should arrive at a similar conclusion; but the long experience and ability of that learned judge are such, that although I should consider it probable that his opinion is right and mine wrong, yet I should hesitate to apply the principle in every case. It might be, for instance, that the intended mortgagee was a retired solicitor, and thought fit to act for himself. How could I say in such a case, that, because the mortgagor happened to be a solicitor, he was to be considered as solicitor for the mortgagee? Or, suppose the mortgagor were a barrister who was not in practice, he might say he could take care of himself, and could act for himself. It would be very hard in such a case to say, that he was therefore to be taken to have acted professionally for the mortgagee. I should also feel great difficulty in a case like the present, where the gentleman is being educated as a solicitor, and is, in fact, an articulated clerk. He has got, at least, some knowledge of what should be done. I do not see the reasonableness of saying, that because Mr. Pemberton was a solicitor, consequently he is to be treated as solicitor for his articulated clerk. Therefore, if it were not for the expression of opinion found in the case of *Hewitt v. Loosemore*, I should not have come to the same conclusion; but as it is I dare say the Lord Justice is right and I am wrong. But suppose Pemberton were to be treated as solicitor for Browne in the transaction, it would be a monstrous perversion of the doctrine of constructive notice to say that, because Pemberton knew of a prior mortgage to the plaintiff, that is constructive notice to the subsequent mortgagee of the prior mortgage. It appears, however, that, in the same case I have mentioned, the same judge refused to add to the constructive solicitorship the additional ingredient of constructive notice, and I entirely concur in the justice of that conclusion.”

On this first question Lord Chancellor Chelmsford said:—

"The notice which a principal is supposed to receive through a solicitor is generally treated as constructive notice; but I cannot help thinking it would be better if it were classed under the head of actual notice. The notice which affects the principal through a solicitor, does not depend upon whether it is communicated to him or not. If a person employs a solicitor who either knows, or has intimated to him in the course of his employment, a fact that is hostile to his interest, he is bound by it, whether the fact is communicated to or is concealed from him. Constructive notice is properly the knowledge which the court imputes to a person, the contrary presumption being so strong it cannot be allowed to be rebutted; and the knowledge must exist either from his knowing something which ought to have put him on further inquiry, or from his wilfully abstaining from inquiry to avoid notice. I should, therefore, prefer calling the knowledge which a person has either by himself or his agent, actual knowledge; or, if it is necessary to make a distinction between that which a person knows himself, and that which is known to his agent, the latter might, I think, be called imputed knowledge. Was Pemberton, then, who came to the transaction with a perfect knowledge of the plaintiff's incumbrance, the solicitor of the defendant? I find it very difficult to accede to the proposition, however high the authority from which it proceeds, that when a mortgagor is himself a solicitor, and preparing the mortgage-deed, the mortgagee employing no other solicitor, the mortgagor must be considered to be the agent or solicitor of the mortgagee in the transaction. I think there must be some consent on the part of the mortgagee to constitute this relation. If he is imprudent enough to intrust his interest to the mortgagor, who is himself a solicitor, he may do so and take the consequences; but he may not desire to have any solicitor, he considering himself equal to the protection of his own interest, and then his mere omission to communicate the circumstance to the mortgagor, who is preparing the deed, cannot constitute him the solicitor. If the mortgagor, under these circumstances, becomes the solicitor of the mortgagee, it is impossible to stop short in applying all the consequences of the relation, and then the knowledge which the mortgagor possesses becomes the knowledge of his client, the mortgagee. It is difficult to escape from this conclusion unless you apply the principle of *Kennedy v. Green* (3 Myl. & K., 699), and exclude this particular knowledge; because the mortgagor was committing a fraud in the transaction which he could not be presumed to communicate, or rather perhaps, because the very commission of the fraud broke off the relation of principal and agent, and therefore prevented the possibility of imputing his knowledge to his client. I think

Pemberton was not the solicitor of Browne in the assignment, and there is not only no proof of consent that he should act in that capacity, but something approaching to a proof of the contrary."

It is necessary, for the clear understanding of this case, that the cases of *Kennedy v. Green*, and *Hewitt v. Loosemore*, should be somewhat fully referred to.

In the first of those cases, *Bostock*, a solicitor, obtained by fraud the execution of a deed by a Mrs. Kennedy, purporting to be an assignment to himself of a mortgage of a leasehold property, and subsequently purchased the equity of redemption. Sometime afterwards he purported to assign this property, by way of mortgage, to his father-in law, Kirby. In the mortgage transaction between Bostock and Kirby, the latter employed no solicitor other than Bostock. Sir John Leach, M.R., held, that Bostock must be considered as the solicitor of Kirby, and that it was impossible for him, under these circumstances, to deny notice [*i. e.*, legal and constructive notice] of the fraud committed upon Mrs. Kennedy. The cause was reheard before Lord Brougham, C., who said, "Bostock was acting as Mr. Kirby's solicitor in the transaction, and although, generally speaking, the knowledge obtained by a man's attorney or agent fixes himself, if obtained while so employed and on the same business, . . . yet it cannot here be said that Mr. Kirby is fixed with all which Bostock knew; for the fraud practised by Bostock upon Mr. Kirby himself, was of course concealed from him; and so we may say would certainly be that other fraud which he had practised on Mrs. Kennedy. Indeed, that was only another part of the same fraud, another act of the same plot; and therefore I think we cannot, on this account alone, fix his client, Mr. Kirby, any more than his other employer, Mrs. Kennedy, with the knowledge of his criminal proceedings. We must lay out of our view all the knowledge, the actual and full knowledge, he had of his own fraud, and are not to hold Mr. Kirby as cognisant—I mean, of course, cognisant in law and constructively—of that, merely because his solicitor, himself the contriver, the actor, and the gainer in the transaction, knew it all well."

In *Hewitt v. Loosemore*, Robert Loosemore, a solicitor, deposited a lease with Hewitt for securing a sum of money, and signed and delivered to Hewitt a memorandum that it was deposited for that purpose. Afterwards, Robert Loosemore assigned the lease to John Loosemore, who had no actual notice of the former security by way of mortgage. John Loosemore employed no solicitor in this transaction, and Robert Loosemore prepared the assignment at his own expense. Upon the ques-

tion, whether Robert Loosemore must be taken to have acted as the solicitor of John in the transaction of the mortgage, and whether, therefore, John had notice through Robert of the lease having been deposited with Hewitt, Turner, V.C., made the following observations:—"I think that where a mortgagor is himself a solicitor, and prepares the mortgage deed, the mortgagee employing no other solicitor, the mortgagor must be considered to be the agent or solicitor of the mortgagee in the transaction of the mortgage. The mortgagee in such cases trusts the mortgagor to discharge those duties which his own solicitor would discharge, if he thought proper to employ one; and it can make no difference that the mortgagor is not paid by the mortgagee—the very nature of the transaction being, that all the expenses are borne by the mortgagor. I am of opinion, therefore, that Robert Loosemore must be considered to have been the agent and solicitor of the defendant in the transaction of his mortgage; but I do not think that the defendant is therefore to be considered to have had notice of the plaintiff's deposit; such notice would be constructive merely, and constructive notice is knowledge which the court imputes to a party, upon a presumption so strong that it cannot be allowed to be rebutted, that the knowledge must have been communicated; and I cannot act upon such a presumption in the face of the evidence which the plaintiff himself has adduced. In determining this point in favour of the defendant, I desire it to be understood that I do not proceed upon the case of *Kennedy v. Green*. The well-founded and wholesome limitation upon the doctrine of constructive notice established by that case, does not appear to me to apply to the present. There was here no fraud in the original deposit with the plaintiff, and no fraud in the mortgage to the defendant, if the fact of the deposit with the plaintiff was communicated; and it would, I think, be a misapplication of the case of *Kennedy v. Green*, to hold that the fact of the deposit must be taken not to have been communicated, because it was a fraud to conceal it. So to apply the case would be, in trying the question, whether there were knowledge or not, to assume that there was fraud."

In considering the question of constructive solicitorship, both Vice-Chancellor Kindersley and Lord Chelmsford seem to have overlooked the fact that the mortgage deed is, we may say, invariably prepared by the mortgagee's solicitor. Now, if the intended mortgagee were, as supposed by the Vice-Chancellor, a retired solicitor, or a barrister "who could take care of himself," he ought, if he act for himself, to prepare the deed; but if he should think proper to permit the mortgagor's solicitor to prepare the same, we cannot see why "it would be very hard to say,"

in the event of their being no evidence to the contrary, that the mortgagor's solicitor must be considered as having acted for both parties.

With respect to the second question, Kindersley, V.C., observed, that no doubt the rule was, that where there was a subsequent mortgagee, though he had no notice of the prior mortgage, if he did not get in the title-deeds, then the court would consider that tantamount to a fraud, and that he had constructive notice of the prior mortgage; but in the present case his Honour thought there was sufficient reason for Browne not obtaining the title-deeds. "It appears that he did ask for them," remarked the Vice-Chancellor; "in fact, they say he asked for them too much, and therefore they say he is charged with negligence in not making his requisitions more effectual; but he is a young man, the articulated clerk of the mortgagor, who married his mother, and the stepfather says, 'You shall have the deeds as soon as I can get them,' and he further says, 'you have got the assignment.' There is nothing in this to make the young man guilty of fraud, or to shew that he was assisting Pemberton to commit a fraud. I cannot in this case come to the conclusion, that there is any such negligence or omission with regard to not procuring the title-deeds, as to lead me to say that the defendant is not entitled to his security."

In deciding this question, the Lord Chancellor was governed by *Hewitt v. Loosemore* and the earlier cases. Some of these cases we will now briefly advert to. Buller, J., in *Goodtitle v. Morgan* (1 T. R., 762), observed that it was an established rule in equity, that a second mortgagee who had the title-deeds without notice of any prior incumbrance should be preferred, because, if a mortgagee lend money upon mortgage, without taking the title-deeds, he enables the mortgagor to commit a fraud. But Lord Chancellor Thurlow, in *Tourle v. Rand* (2 Bro. C.C. 652), remarked that it was to be wished that the cases in the Court of Chancery on which this opinion was grounded had been named, for he did not conceive that a first mortgagee not taking the deeds was alone sufficient to postpone him; and in *Penner v. Jematt* (2 Bro. C.C. 652, note), Lord Thurlow held that there must be a voluntary leaving of the deeds, to entitle the second mortgagee to have the prior mortgage postponed. In *Evans v. Bicknell* (6 Ves., 183), Lord Eldon observed that Mr. Justice Buller's proposition was not true, but did not wonder that it had been so stated; for in *Ryall v. Rolle* (1 Ves., 360; 1 Atk., 168), it is so stated by Mr. Justice Burnet, and without observation by the Lord Chancellor (Hardwicke), or the other learned persons (Lee, L. C. J., and Parker, L. C. B.), by whom the Chancellor was assisted, as being contrary to the law of the Court of Chancery.—(See also 4 Madd. 135.)

The general rule that nothing but fraud, or gross, or voluntary negligence in leaving title-deeds, will oust the priority of a legal mortgagee, was established in *Plumb v. Fluitt* (2 Anstr., 432). In that case, title-deeds were deposited with A. as a security for money; the property was then conveyed to B. by way of mortgage without notice of A.'s security. It came out in evidence that, on the mortgage being proposed, B. sent for the title-deeds; the mortgagor then said he could not give them to him, but promised to bring them in a few days. When the mortgage was to be executed, the mortgagor again excused himself for not bringing the title-deeds with him, but promised to send them next day, and two days after the mortgage was executed, he informed B. of A.'s security. Eyre, L. C. B., held that B. had not been guilty of such gross and voluntary negligence as would postpone him to A.

The doctrine established in *Plumb v. Fluitt*, was reasserted by Lord Eldon in *Evans v. Bicknell* (6 Ves., 190), and in *Martinez v. Cooper* (2 Russ., 98). It was assented to by Sir Wm. Grant in *Barnett v. Weston* (12 Ves., 133), and apparently by Sir John Leach in *Harper v. Faulder* (4 Madd., 138), who, however, did not there consider himself called upon to decide the general question; it was followed by Lord Langdale in *Farrow v. Rees* (21 Beav., 18), and by Sir James Wigram and Lord Cottenham in *Allen v. Wright* (5 Hare, 272, and 11 Jur., 527; 16 L. J. Ch., 370.)

In *Hewitt v. Loosemore*, Turner, V.C., after referring to *Plumb v. Fluitt*, and the subsequent cases mentioned above, remarked:—"It was said in the argument that the cases to which I have referred could not be reconciled with the decision in *Jackson v. Rowe* (2 S. and S., 472), with what fell from Lord Cottenham in *Dryden v. Frost* (3 My. and Cr., 673), and from Lord Langdale in *Tylee v. Webb* (6 Beav., 552), and with the determination of the late Vice-Chancellor of England in *Worthington v. Morgan* (16 Sim., 547). But upon examining those cases, I do not think they will be found inconsistent with *Plumb v. Fluitt*."

In *Jackson v. Rowe*, Mrs Jackson, under the settlement made on the marriage of her parents, and an appointment made after her father's death by her mother, was entitled, subject to the life-interest of her mother, to an estate in fee. The title-deeds of the estate were kept by Mrs. Jackson's mother, who married a second time, and, pretending to be seized in fee, conveyed the estate in consideration of marriage to her second husband in fee. Here it was held that the second husband, like every other purchaser, was bound to use due diligence in the investigation of the title before he accepted the conveyance of the estate. With due diligence he must have discovered that his intended

wife had only a life estate. "In *Jackson v. Rowe*," said Turner, V.C. (9 Hare 457), "the question was not whether a prior equitable title could prevail against a subsequent legal one, but whether there was a good equitable defence against a prior legal title; and it did not appear that any inquiry whatever had been made about the title-deeds."

In *Dryden v. Frost*, Lord Cottenham observed, that "John Frost, the mortgagee, was in this case taking the title from a purchaser who was not in possession of the title-deeds. They were in the possession of the plaintiff, a circumstance which, according to the authority of *Hiern v. Mill* (13 Ves., 112), was of itself sufficient notice of the title of the party in possession of them." The facts of the case of *Dryden v. Frost* do not appear from the report; but the facts in *Hiern v. Mill* were, that a purchaser for valuable consideration, though apprised that the title-deeds were in the hands of a third party, did not choose to inquire of him whether he had a claim upon the estate; and as Lord Cottenham, in *Dryden v. Frost*, referred to *Hiern v. Mill* as an authority, it is to be assumed that Frost, the mortgagee, had notice that the deeds were in the hands of Dryden, the plaintiff, "in which case," said Turner, V.C., in *Hewitt v. Loosemore*, "both according to *Hiern v. Mill*, and *Birch v. Ellames* (2 Aust., 427), and with reference to the doctrine of the court as to estates in the possession of tenants, he was bound to make further inquiry."

In *Tylee v. Webb*, Robert Webb, a copyholder, deposited the copy of the Court roll, shewing his admittance to the property in question, with Messrs. Tylee, as a security for money. Upon the death of Robert Webb, Thomas Webb, his son, was admitted tenant of the estate, and received a copy of the roll, dated 7th Nov., 1833, stating that Thomas Webb had been admitted as the only son and heir of Robert Webb, who held by copy of Court roll, dated 18th Dec., 1829. The copy of the 7th Nov., 1833, was deposited by Thomas Webb with Hinton, as a security for money. Lord Langdale said, "I incline to think that Hinton, who knew that Thomas Webb had been admitted only in his character of heir of Robert Webb, and that Robert Webb had been admitted under copy of Court roll, dated 18th Dec., 1829, must be deemed to have known that Robert Webb, having that copy of Court roll, might have deposited it so as to create an equitable charge upon the estate, and consequently ought to have required its production before he advanced his money." But as was observed by Turner, V.C., in *Hewitt v. Loosemore*, there was no question in *Tylee v. Webb* as to the legal estate. Messrs. Tylee and Hinton were both mere equitable mortgagees by deposit.

In *Worthington v. Morgan*, Corbett agreed to purchase an estate for £1400, of which £400 was to be paid on the completion of the purchase, and the residue to be secured by a mortgage of the estate agreed to be purchased. The estate was conveyed to Corbett, who paid £400 as agreed, but neglected to execute any mortgage to secure the residue of the purchase-money. Neither the title-deeds nor the conveyance to Corbett were delivered to him by the vendors. After a lapse of three years, a mortgage was executed by Corbett to the plaintiffs, his vendors; but in the interval he had mortgaged the estate to Morgan without the knowledge of the plaintiffs. It was admitted that neither Morgan, nor any person in his behalf, investigated the title to the estate, or required to see the title-deeds or the conveyance to Corbett. The Vice-Chancellor of England remarked, that he entirely acquiesced in what was said by the Lord Chancellor in *Allen v. Knight*, but the case was quite different from that. The Vice-Chancellor held that the lien of the plaintiffs was unaffected by Morgan's mortgage, on the ground that it was the duty of Morgan to ask for the deeds.

"The law, therefore, as I collect it from the authorities," said V. C. Turner in *Hewitt v. Loosemore*, "stands thus:—That a legal mortgagee is not to be postponed to a prior equitable one, upon the ground of his not having got in the title-deeds, unless there be fraud, or gross and wilful negligence to the mortgagee, if he has *bonâ fide* inquired for the deeds, and a reasonable excuse has been given for the non-delivery of them; but that the court will impute fraud, or gross and wilful negligence, to the mortgagee if he omits all inquiry as to the deeds. And I think there is much principle both in the rule and the distinctions upon it. When this court is called upon to postpone a legal mortgagee, its powers are invoked to take away a legal right; and I see no ground which can justify it in doing so, except fraud, or gross and wilful negligence, which in the eye of this court amounts to fraud; and I think that, in transactions of sale and mortgage of estates, if there be no inquiry as to the title-deeds, which constitute the sole evidence of the title to such property, the court is justified in assuming that the purchaser or mortgagee has abstained from making the inquiry, from a suspicion that his title would be affected if it was made, and is therefore bound to impute to him the knowledge which the inquiry, if made, would have imparted. But I think, that where *bonâ fide* inquiry is made, and a reasonable excuse given, there is no ground for imputing the suspicion, or the notice which is consequent upon it."

In *Hewitt v. Loosemore*, the facts were, that John Loosemore, the legal mortgagee, who was a farmer, unacquainted with legal

forms, upon the indenture of mortgage being handed to him, inquired of Robert Loosemore, the mortgagor, whether the lease ought not to be delivered to him as well. Robert Loosemore replied that it should; but that, as he was rather busy then, he would look for it, and give it to John when he next came to market.

Turner, V.C., applying the principles he had enunciated to this particular case, was of opinion that a sufficient case for postponing John Loosemore had not been made out.

Lord Chelmsford, in his judgment in the case of *Espin v. Pemberton*, observed that it was said that the doctrine thus laid down by Turner, V.C., was new, and that the decision had not given satisfaction to the profession; but Lord Chelmsford thought that the judgment was consonant with the prior decisions. His lordship then said—"That the inquiry made by Browne precluded the possibility of supposing that he abstained from all inquiry for fear of hearing something adverse to the title, and the answer which he received was a sufficient excuse to induce him not to prosecute his inquiries further. The case, indeed, bears a singular resemblance in all respects to the case of *Plumb v. Fluitt*, which has been followed in the various cases cited in *Hewitt v. Loosemore*. It is said that this case is of great importance to the commercial world, and that the doctrine which it asserts will alarm bankers and others who have advanced their money upon the deposit of deeds, and that they will be rendered liable to have their securities affected by secret assignments; but the only effect of such a doctrine, if it were new, would be to prevent persons obtaining advances of money with such facility upon the deposit of their deeds, and whether any great mischief would arise from a check being put upon equitable mortgages of this description may be extremely questionable. The law, however, has been settled for a great number of years, at least from the time of *Plumb v. Fluitt*, which is now sixty years ago, and it has not been found that it has rendered persons unwilling to advance money upon such securities. But considerations such as these can have no effect, unless to prevent any new rule of law being laid down; and, whatever the consequences may be, I am bound by the prior decisions, and I am only following the uniform course of them when I arrive at the conclusion, that there is no such gross neglect on the part of Browne in not pursuing the inquiry he had made, as would induce the presumption of notice of the plaintiff's incumbrance."

In *Espin v. Pemberton*, no reference was made to the case of *Atterbury v. Wallis* (25 L. J., ch. 792), in which the facts were as follows:—In 1835 Parsons conveyed to Lampray, a solicitor, hereditaments in Warwick and other hereditaments, by way of

mortgage to secure £450, subject as to the hereditaments in Warwick to a prior mortgage to Warder. In 1838 Lampray assigned by way of mortgage to certain persons (represented at the time of the suit by Atterbury), amongst other sums, the debt of £450, and all deeds, &c., relating to the same. In 1839 Warder, Lampray, and Parsons joined in a mortgage of the Warwick property to Wallis, in which no mention was made of the security effected by Lampray in 1838; but Lampray covenanted to produce the mortgage of 1835. Atterbury alleged that Lampray had acted as the solicitor of all parties on the occasion of the mortgage to Wallis, and charged him with notice of the assignment of 1838, and with negligence in not requiring the delivery or production of that deed. Wallis, who was a farmer, denied that he had employed Lampray as his solicitor, and stated that he had employed no solicitor at all; he was ill at the time, and had left the matter to his brother, a corn-dealer, who, as well as Lampray, had since died. There was no evidence produced from Lampray's books to show that he had acted as Wallis's solicitor. The Master of the Rolls held that there was not sufficient evidence for treating Lampray as Wallis's solicitor, and that Wallis had not been guilty of culpable negligence, as charged. Sir John Romilly was of opinion that if a solicitor had forborne to ask for the production of the mortgage deed of 1835, but had been satisfied with a statement made by the mortgagor that it included other property, and that therefore it could not be delivered up, that would not have been such conduct as to fix the solicitor necessarily with notice that the mortgage had been assigned. This opinion of the Master of the Rolls is certainly somewhat inexplicable. We do not see why a deed should not be *produced* because it cannot be *delivered up*. If Wallis, before taking a release of Lampray's mortgage, had insisted upon the production of the deed, he must necessarily have found out that it was in the hands of some other person, unless indeed Lampray should have managed by fraud to gain possession of the deed for a time, as was the case in *Peter v. Russell* (1 Eq. Ca. Abr. 321).

The Lords Justices, however, were of opinion that Lampray did act as Wallis's solicitor, and that this connection affected Wallis with notice, and consequently the question of negligence, in not requiring production of the mortgage deed of 1835, was not decided by their lordships; but the Lord Justice Turner nevertheless referred to *Hewitt v. Loosemore*, and said that he continued of the same opinion as he had expressed in that case with respect to the necessity of making inquiry about deeds.

What amount of negligence will be considered by the court as gross and culpable negligence, depends upon the circumstances of each case. Thus Lord Cranworth, in *Ware v. Lord Egmont*

(4 De G., M. & G., 473), observed that where a person has not actual notice, he ought not to be treated as if he had notice, unless the circumstances are such as enable the court to say, not only that he might have acquired, but also that he ought to have acquired, the notice with which it is sought to affect him—that he would have acquired it but for his gross negligence. “The question,” proceeded his lordship, “when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might by prudent caution have obtained, the knowledge in question, but whether the not obtaining it was an act of gross or culpable negligence. It is obvious that no definite rule as to what will amount to gross or culpable negligence, so as to meet every case, can possibly be laid down.”

The following cases, not cited in *Espin v. Pemberton*, relate to the question of negligence:—*Whitbread v. Jordan* (1 Y. & C.), Eq. Exch., 303; *Waldon v. Sloper* (1 Drew, 193); *Rice v. Rice* (2 Drew, 73); *Jones v. Williams* (5 W. R., 775); *Roberts v. Croft* (5 W. R., 773, S. C. in App., 27, L. J. Ch., 220); *Colyer v. Finch* (19 Beav, 500; S. C. in App., 5 H. L. Cas., 905; 26 L. J. Ch., 65); and *Perry-Herrick v. Attwood* (27 L. J. Ch., 121).

The onus of proving gross negligence lies on the person who seeks to postpone the prior or legal incumbrancer.—*Carter v. Carter* (3 K. and J., 617).

That Lord Chelmsford and V. C. Kindersley, in *Espin v. Pemberton*, followed the current of authority, cannot we think be doubted, for Browne could not be said to have been guilty of gross negligence. Nor was any new doctrine laid down in *Espin v. Pemberton*. The rule that nothing short of gross negligence will postpone a legal mortgage without the title-deeds, was stated by Lord Cranworth in *Colyer v. Finch*, and again in *Perry-Herrick v. Attwood*, to have been established beyond a doubt. That such should be the rule is however, we think, to be regretted. L. C. B. Eyre, in *Plumb v. Fluitt*, and Lord Eldon, in *Evans v. Bicknell*, remarked, that they should have been glad to find the rule the other way; and Lord Cranworth, in *Perry-Herrick v. Attwood*, observed, that in his opinion the rule often led to great hardship. Lord Eldon thought, if those cases were excepted in which, from the nature of the title, the deeds might be honestly out of the possession (as, for instance, in cases of joint tenancy and tenancy in common), such a rule as laid down by Mr. Justice Buller (and to which we have referred above), would avoid a great deal of fraud in mortgage titles, “upon which,” added Lord Eldon, “this observation arises—that no man can tell when he is perfectly seoure.”

On the other hand, both Lord Chelmsford and V. C. Kin-

dersley seem to think it questionable whether any mischief would arise from a check being put upon equitable mortgages by deposit. We cannot but think that the general opinion will, in this respect, be opposed to that of those learned judges. Any check of this kind, which would prevent commercial men from obtaining advances on sudden emergencies at a moment's notice, cannot, to use the words of the Registration Commissioners in their report of 1857, be contemplated in a great commercial country without apprehension and alarm.

How far the questions considered in *Espin v. Pemberton* may be affected by the clause relating to notice in Lord St. Leonards' bill¹ to amend the law of property, is not quite clear. The clause referred to is to the effect, that no *bonâ fide* purchaser for valuable consideration, or mortgagee, shall be bound by any other than *actual* notice of a charge affecting property. Now, the late Vice-Chancellor of England held, that "notice to a solicitor was *actual* notice to the client."—*Tunstall v. Trappes* (3 Sim. 307). If this be upheld, then it is clear that the first question considered in *Espin v. Pemberton* will not be affected by the clause alluded to.

With respect to the second question, it remains to be seen whether courts of equity will give up their jurisdiction in cases of gross negligence, amounting to what the Courts may deem to be fraud. But if the effect of this clause in Lord St. Leonards' bill be to render it perfectly immaterial whether a purchaser, without *actual* notice of a charge, inquire after the deeds or not, so as to render equitable mortgages by deposit *impossible*, then the result must be contemplated with "apprehension and alarm."

2. JACKSON v. FORSTER. 28 L. J. Q. B., 166. (Confirmed on Appeal, 7 W. Rep., 578, 18th June, 1859.)

What is a bonâ fide assignment for valuable consideration of a Life Policy?

In Hilary Term of the current year, two cases relating to the contract of Insurance were argued and decided in the Court of Queen's Bench, which, amongst other things, serve to shew that the language employed by insurance offices on this branch of the law is in a very imperfect state; considering the importance of insurance to commerce, and the extent to which the practice of insuring now enters into all the business of modern life, these cases deserve attention.

The first case we shall refer to is that of *Jackson v. Forster* (28 L. J., 166, Q.B., confirmed in Error). The condition in

¹ The bill has passed the House of Lords, but has not yet (20th July, 1859) finished its career in the Commons.

the policy on which the question was raised, was that relating to *suicide* by the insured. "The policy will be void if the life assured die by his own hands, the hands of justice, by duelling, or suicide; but if any third party have acquired a *bonâ fide* interest therein by assignment, or by legal or equitable lien for a valuable consideration, or as security for money, the assurance thereby effected shall nevertheless, to the extent of such interest, be valid and of full effect."

The deceased (De Bordes) was a member of a firm of Mickle & Co., which became bankrupt at Valparaiso on 9th July, 1856. By operation of law, the property immediately vested in the Escribano attached to the Consulado Court at Valparaiso. On the 15th of July assignees were appointed, and the property *ipso facto* shifted from the Escribano, and vested in the assignees. On the day previous, viz., the 14th July, the deceased committed suicide. The question was, did the assignees take any interest under the policy? The object of the condition above extracted, it was said, was to protect the company from fraud, and to prevent the assured having an interest in committing suicide, in order that some one might get the benefit of the policy—that the assignment to the Escribano was a *bonâ fide* assignment for the benefit of all the creditors, and was as valid as if the deceased had assigned the policy to some one individual creditor. On the other hand, it was urged that the above condition was introduced to prevent suicide, and also to make the policy marketable—that the intention was to favour those who had dealt with the policy, and not those who were merely standing in the place of the assured—and that *bonâ fides* was not a phrase applicable to bankruptcy.

And the court so held, thinking the words referred to one taking the policy as a *bonâ fide* assignee, having contracted for it, and that the provision does not extend to a case where there is no contract; but that "the provision applies where the policy has been assigned by a contract." Crompton, J., observed he had had considerable doubt about this during the argument; but eventually he agreed with the rest of the court, who thus limited the term "assignment" as we have just mentioned. This construction we do not venture to dispute, but we submit that the language employed to express the meaning of the parties to the policy, is improperly obscure, and should be amended.

3. THE LONDON AND NORTH WESTERN RAILWAY COMPANY v. GLYN. (28 L. J., Q.B., 188.)

This is another case decided on a point raised as to the significance of a usual proviso in a policy of insurance against fire. The

insurance in question was (in December, 1854) effected by the plaintiffs with the Globe Company for £35,000, of which £10,000 were declared to be on a warehouse occupied by Pickford & Co., at Camden Town Station; and £15,000 "on goods the plaintiffs' own, and on trust as carriers, in the said warehouse." One of the conditions attached to the policy was, that "goods held on trust or on commission are to be insured as such, otherwise the policy will not extend to cover such property." It was in respect of the goods to which, it was contended, this £15,000 referred that the dispute arose, the warehouse and goods having been consumed by fire during the existence of this policy.

The plaintiffs are common carriers, and through their agents, Pickford & Co., received certain silk goods, of the value of £10 and upwards, to be consigned to Edinburgh. Although the value and nature of this silk was not declared under the provisions of the Carriers' Act (1 Will. IV., c. 68), the plaintiffs paid its owners in respect thereof, it having been burnt in the warehouse. The decision of the court, whether the plaintiffs were entitled, under the policy, to recover the value of the silk, was to determine the general right of the parties.

By the case of *Waters v. The Monarch Insurance Company* (5 E. & B., 870), it was argued, should the present case be guided. There the plaintiffs were wharfingers and warehousemen, and insured flour, "the property of the insured, or held by them in trust or commission." The flour was the property of the customers, and left at the plaintiffs' warehouse for the purpose of being carted as they might receive directions; and it was held that the flour intrusted to the plaintiffs were "goods on trust;" that there was nothing illegal in such a policy, and that it extended beyond the plaintiffs' personal interest or lien on such goods; that they were entitled to retain so much of the money paid them by the insurance company as covered their own interest, and they were trustees for the owners as to the rest, and were interested in every part of the goods.

On the other side, it was said the payment made by the plaintiffs to the owners was voluntary. Who are the assured? What loss have they sustained? Why should *carriers* insure any interest but their own? The reference of "trust as carriers," it was urged, pointed to the necessity of their divulging to the insurance company whether the goods belonged to them or to others; that the case of *Waters v. Monarch Insurance Company* was that of *wharfingers*, and where it is a custom of trade to have floating policies for the benefit of themselves and the owners of goods alike; that the Carriers' Act removed the liability of the plaintiffs to pay, and therefore deprived them

of the right to recover. Further, it was contended that if the plaintiffs insured for the benefit of their customers, and if a policy happened to cover only the insurer's own property or personal interest, nevertheless they would have to share the sum so insured with the *cestui que* trust, and thus miss realizing a security for their own losses. The question, observed Erle, J., is, whether the plaintiffs, when intending to insure their own interest, made in the term of the policy a special stipulation with the insurance company, that if they had a defence against the owner and sender of the goods, under any provision of law relating to carriers, they would avail themselves of it. "I would add," continued the learned judge, "that if, for the future, insurance companies, allowing a carrier to insure goods passing through his hands, mean to limit the liability that they incur to such liability as by law could be enforced against the carrier *in invitum*, more definite words to that effect should be employed than are to be found in the present policy."

On the authority of the case already cited, as well as on principle, judgment was given for the plaintiffs. Assuming that the respectable company which defended the action did not mean to enter on the contract as it has been thus interpreted by the court, but had the effect of the Carriers' Act in view when they framed the terms of the policy, they should have taken pains to express their meaning clearly, and we commend the observation of Erle, J., to the notice of their legal advisers.

4. LOFFT v. DENNIS. (28 L. J., Q. B., 168.)

Fire Insurance—House burnt down—Rent payable for Use and Occupation—Lord St. Leonards' Handy-book observed upon.

An equitable plea had been pleaded in this case, which was for rent due for use and occupation. The effect of the plea was, that the value of the premises holden by the defendant of the plaintiff had been diminished by reason of certain buildings thereon having been burnt down; that, although the plaintiff had received his insurance money from a fire-office, he had not rebuilt, and the defendant thereupon claimed to be exempt from paying the full rent. Among the authorities quoted in this case were *Leeds v. Cheetham* (1 Sim, 146), *Brown v. Quilter* (Ambl., 619), and Lord St. Leonards' *Handy-book* (1st Ed., p. 101). The passage from the last authority is as follows:—

"If, therefore, you mean that a tenant at rackrent shall insure at his own costs, you must make him agree to do so by the contract. If you omit this, the lease must be so framed as to exempt him from making good accidents by fire. But, even in

this case you are not bound to insure ; and although the house should be burnt down, yet the tenant must continue to pay the rent, so that each bears his burden—you lose your house, and the tenant loses his rent during the term. *If, however, you have insured, although not bound to do so, and received the money, you cannot compel payment of the rent if you decline to lay out the money in rebuilding.*"

Lord Campbell concludes his judgment in *Lofft v. Dennis* by expressing the deep respect he has for the opinion of Lord St. Leonards, but affirms that what he states in the above passage does not appear to have been made law hitherto. "If it were," the Chief Justice adds, "I should support it." So Crompton, J., remarked—"If it had not been for the passage in Lord St. Leonards' Handy-book I should not have felt any difficulty in this case. There was no agreement to insure the premises, nor any thing to show any obligation to insure ; but it merely appears that the plaintiff chose to do so, and then the tenant says, 'Well, if you are going to insure, I will not !' If any inducement had been held out to the defendant not to insure the premises, the case might have been different."

In *Brown v. Quilter* the plaintiff had rented a house for a term of years, and in the lease he covenanted to repair, &c., *accidents by fire excepted*, and the defendant entered into the usual covenant for quiet enjoyment. The house was burnt down, and the defendant, who had insured, received the insurance money, but did not rebuild the house ; insisting, nevertheless, upon his right to the rent. The defendant having brought an action for the rent, the plaintiff filed his bill for an injunction to compel the defendant either to rebuild or pay to the plaintiff the insurance money. The defendant, by his answer, offered to take back and cancel the lease ; but the plaintiff, choosing to continue tenant without having the house rebuilt, rather than to give up the lease, he consented to the dismissal of the bill. The main point, therefore, was not decided otherwise than in the remarks by Lord Northington, which we will now quote :—

"The justice of the case is so clear, that a man should not pay rent for what he cannot enjoy, and that occasioned by an accident which he did not undertake to stand to, that I am much surprised it should be looked upon as so clear a thing, *that there should be no defence to such an action at law* ; and that such a case as this should not be considered as much an eviction as if it had been an eviction of title, for the destruction of the house is the destruction of the thing. Though this covenant does not extend to oblige the defendant to rebuild, yet when an action is brought for rent after the house is burnt down, there is a good ground of equity for an injunction till the house is rebuilt."

Turning now to *Leeds v. Cheetham*: the defendant had there demised by indenture to the plaintiff a factory for twenty-one years. The plaintiff covenanted to pay the rent, and to repair the inside of the factory, and the defendant covenanted to maintain all the outer part of the premises in good repair. There was no exception with respect to accidents by fire, either in the covenant for payment of the rent, or in the covenants to repair. The premises were burnt down, and defendant, who had insured, received the insurance money. Under this state of facts, Leach, V.C., held that there being in the lease no exception as to the case of accident by fire, the plaintiff by law continued bound to pay his rent, he continued bound also by his covenant to keep in repair the inside work of the factory. On the other hand, the defendant, for want of the like exception, continued bound by his covenant to repair the outer part of the building; and, from the particular terms of the defendant's covenant, the judge said that he was "bound to rebuild the factory, and to cover in the same with proper roofing and slating, or tiling . . . It appears to me that, in this respect, equity must follow the law. The plaintiff might have provided in the lease for a suspension of the rent in the case of accident by fire; but, not having done so, a court of equity cannot supply that provision which he has omitted to make for himself, and it must be intended that the purpose of the parties was according to the legal effect of the contract. With respect to the equity which the plaintiff alleges to arise from the defendant's receipt of the insurance money, there is no satisfactory principle to support it. The defendant having so contracted with the plaintiff as to render himself liable to rebuild the outer work of the factory in case of accident by fire, has very prudently protected himself by insurance from the loss he would otherwise have sustained by such an accident. But upon what principle can it be that the plaintiff's situation is to be changed by that precaution on the part of the defendant, with which the plaintiff had nothing whatever to do? The plaintiff has sought his protection in the contract by the covenant which he has required from the defendant; and to those covenants must he alone resort." To which he adds, "The remedy is at law, and this court cannot interfere."

The statement of the law in Lord St. Leonards' book, which we have printed in italics, was founded on the ruling in *Brown v. Quilter*, and the learned lord in his new edition (7th, p. 127, n.) distinguishes his statement of the law from that in *Leeds v. Cheetham*, and *Lofft v. Dennis*. In the first place, in *Leeds v. Cheetham* there was no exemption from casualties by fire; while Lord St. Leonards is referring to cases where the tenant is exempt from such casualties. Again, in *Leeds v. Cheetham* the plaintiff and defendant were

left to their remedies at law, as distinctly pointed out by the judge, and it was a mere act of prudence on the part of the landlord to protect himself against liabilities by insuring; but in the case proposed by Lord St. Leonards, the tenant would have no remedy whatever at law against the landlord, there being no covenant on the part of the latter to rebuild. In *Lofft v. Dennis*, the tenant, it would seem, was merely a tenant from year to year; therefore "the decision in that case was not opposed to any rule of equity, for equity would not compel a lessor to lay out the money on rebuilding when either party might put an end to the relation of landlord and tenant before the foundation could be well laid."—(*Handy book*, 7th edit., p. 128, note.) Lord St. Leonards, accordingly, has retained his original text; but remarks, in the note from which we have just quoted, that the decision in *Lofft v. Dennis* was supposed to overrule it, though we may observe that the court of Q. B., on consideration, will probably see that it does no such thing.

A curious phenomenon may be observed in the judicial proceedings which we have referred to. Thirty years ago, a V.C. came to his decision in *Leeds v. Cheetham*, on the ground that "equity must here follow the law." The Court of Queen's Bench, instead of deducing from legal principle the result they should arrive at, considered itself "bound" to follow "the solemn judgment" of the V.C. in *Leeds v. Cheetham*, and thus, contenting itself to follow equity, completed a vicious circle.

Though the judgment in *Lofft v. Dennis* may perhaps, considering the fact of the tenant being a yearly one, be pretty generally acquiesced in, yet the processes by which the Lord Chief Justice (closely followed by his puisnes) arrived at the particular results reported, do not afford overwhelming evidence of judicial acumen.

We will take the opportunity also of drawing the reader's attention to the difference between the law of England and the Scotch law on this head—one of which only can be founded on genuine equity; for it is stated in the judgment of *Lofft v. Dennis*, that "by the law of Scotland, if premises are burnt down by an accidental fire, the tenant is relieved from payment of the rent;" which is not so by the law of England, where, if there is an absolute covenant to pay rent, such covenant must be performed.

Notices of New Books.

[*.* It should be understood that the notices of new works forwarded to us for review, and which appear in this part of the Magazine, do not preclude our recurring to them at greater length, and in a more elaborate form, in a subsequent number, when their character and importance seem to require it.]

A Handy-Book on Property Law, in a Series of Letters. By Lord St. Leonards. Seventh Edition, with Additions and an Index. W. Blackwood & Sons. Edinburgh and London: 1859.

SINCE the 1st January, 1858, this remarkable work has passed through seven editions. We call it "remarkable," not only because of its intrinsic merits, and its appearing in an age wherein a multitude of *not* remarkable works are vomited from the press, and sink or swim for a time on the waves of the public approbation according to accident; but because we know of no other instance in the universal history of legal literature, where an author may *see* his book in the library of the country gentleman—nay, on the drawing-room table of an English lady—as well as *hear* it cited at the Bar, and admitted by the Bench as an authority. It affords, indeed, the best example we know of the power of simplicity arising from perfection of knowledge.

We reserve for future consideration certain new matter introduced by the author since the publication of the first edition of this Handy-book. The perusal of its pages, in its present form, suggests much which cannot be hastily noticed. We will content ourselves for the present by mentioning to our readers, that the chief addition is the new letter (IX.), containing observations on a "General Registry" in connection with titles to real property.

We have in this number, in our notes of recent leading cases, considered *Lofft v. Dennis* in relation to Lord St. Leonards' remark, p. 127. Other new and interesting matter will also be found interspersed through his pages.

We will add, the book is worthy of a more complete and correct index than the one it has been furnished with. Not only is it imperfect, but occasionally the reference to the pages is inaccurate.

Cases selected from those heard and determined in the Vice-admiralty Court for Lower Canada, relating chiefly to the Jurisdiction and Practice of the Court as involving Questions of Maritime Law, of frequent occurrence in the Trade and Navigation of the River and Gulf of St. Lawrence, and edited by George Okill Stuart, Esq., Q.C. Stevens & Norton, 1858.

THE above title explains the subject of this volume—which, though

it relates to the administration of maritime law in one of the colonial courts, is nevertheless printed and published in London, and will prove of use to the English lawyer practising in our Admiralty courts.

Since the court was established (which it was after the treaty of Paris, 1763), the increase of commerce on the water of the St. Lawrence has been enormous. The yearly tonnage, it is said, has increased from 5000 to 600,000 tons; thus explaining how the importance of the court above referred to has been augmented.

A Hand-book of the Practice of Election Committees, with an Appendix of Statutes, Forms, and Precedents. By P. Burrowes Sharkey, Solicitor and Parliamentary Agent. London: Butterworths, 1859.

THE compiler of this little volume has brought together the matter which relates to the practice of Election Committees, in a form sufficiently compendious for those whose duty obliges them to learn the general outline of the ordinary procedure of these tribunals. There are many solicitors who will find the information now collected in this small five-shillings book just enough for their purpose.

A Letter to the Earl of Shaftesbury, on the Laws which regulate Private Lunatic Asylums, with a Comparative View of the Process "*De Lunatico Inquirendo*" in England, and the Law of "Interdiction" in France. By Edward J. Seymour, M.D., &c., late Senior Physician to St. George's Hospital. London: Longman & Co., 1859.

THE subject which Dr. Seymour here writes about is of great importance. However, he has treated it in a very rambling and unintelligible fashion. The construction of the learned physician's sentences is so ungrammatical and illogical, that we can hardly understand how the pages before us were ever allowed to be printed and circulated. They read like the production of an illiterate person, and cannot possibly carry any weight. The preface, and the concluding sentence of the "Letter," are ludicrous examples of the writer's inability to express very simple ideas. He runs his topics into each other, and shuffles about after Mrs. Nickleby's style, in utter helplessness. This is much to be regretted if Dr. Seymour has any valuable suggestions of a practical kind to make, and if he be (as is probably the case) entitled to be heard on the matter he attempts to discuss.

Dr. Seymour draws attention to the French system, in relation to inquiries with respect to lunacy, and compares it with the English.¹

The following is the author's statement of the French system.

¹ The practice under the English law will be found well expounded in Mr. C. P. Phillips' recent work on the subject.

We place in a parallel column the English system, that our readers may compare their respective merits:—

French Code.

"1. Any one who, having obtained his majority, is in an habitual state of imbecility or dementia or furious madness, ought to be interdicted, even when lucid intervals occur.

"2. Any relation is admissible to promote the interdiction of a relation, and the same of husband against wife, or wife against husband.

"3. In case of furious madness, if the interdiction be not demanded either by the husband or the wife, or the relations, the *Procureur Impérial*, in case of imbecility or dementia, may also set it on foot against any one who has neither husband, nor wife, nor known relatives.

"4. Every application for interdiction shall be carried before the Tribunal (de Première Instance).

"5. The facts of imbecility, madness, or furious madness, shall be detailed in writing.

"6. Those who carry on the interdiction shall produce the proofs and witnesses.

"7. The Tribunal will then order that the 'Family Council,' constituted in the manner ordered in No. 4 of Chapter the Second, shall give its opinion on the state of the person whose interdiction is demanded.

"8. Those who have demanded the interdiction cannot make part of the 'Family Council;' how-

English Law.

"1. If the well-being and happiness of a person possessed of property demands that he should be the subject of an inquisition, the L. C. will direct it; otherwise not. See 1 V. & B., 59; 1 M. & Gor., 132. (Phillips, pp. 247, 248.) As to dangerous lunatics (Id. 64, 65), and see Campbell, C. J., in *Fletcher v. Fletcher*, as to lunatics wandering abroad, 7 W. R., 187. See also Phillips, pp. 171, 172.

"2. Any person may apply, at the risk of costs and damages, if there is no foundation whatever for the proceeding. (Phillips, p. 241.)

"3. An inquiry may be instituted on report of Commissioners in Lunacy, in the case of any lunatic, furious or not, and with or without family or friends. (Phillips, p. 246.)

"4.

"5. Same in England.

"6. Same in England.

"7. Impartial medical evidence required with us. (Phillips, p. 244.)

"8. With respect to disqualifications.—*Vide* Phillips, pp. 278—281.

ever, the husband, or wife, or the children of the person sought to be interdicted, may be admitted without vote or deliberation.

"9. After having received the opinion of the 'Family Council,' the court will examine the defendant in the Council Chamber, and, if he is unable to be present, he shall be interrogated at his own house by one of the judges appointed, assisted by the Registrar. In every case the *Procureur Impérial* shall be present when he is interrogated.

"10. After the first interrogation, the Tribunal will appoint, if it be necessary, an administrator provisionally, to take charge of the person and property of the defendant.

"11. Judgment on a demand for interdiction can only be given in public, the parties heard or sent for. (?)

"12. *In rejecting a demand for interdiction, the Tribunal may nevertheless, if circumstances require it, order that the defendant shall not hereafter plead, compromise, borrow, receive personal property, purchase or give receipts, alienate or mortgage his property without the assistance of a council, who shall be appointed at the same time.*

"13. In case of appeal against the judgment of the Tribunal (*première instance*), the Court of Appeal shall, if it thinks it proper, interrogate again the defendant, or cause him to be interrogated by a person commissioned by them.

"14. Every order or judgment, carrying either interdiction or nomination of a council, shall be, by the care of the plaintiffs, signified to the parties, and inscribed within ten days on the tablets,

"9. The lunatic may resist the inquiry at every stage by counsel, and he is viewed by the master, a jury, and sometimes by the L. C.

"10. Interim committee, but not until the lunatic has been adjudged to be such.

"11. Same in this country.

"12. The inquiry is, whether a man is of unsound mind, and incapable of *managing his affairs*? If he is capable, he is not fettered in any way.

"13. The lunatic, if capable of volition, may insist on a new trial, *i.e.*, a traverse.

"14. The committees, next of kin, and the heir, have notice of every proceeding—(why publish them to the loungers in the "hall of audience" and notaries?)—and any person may apply for leave to

which must be hung up in the hall of audience, and in the studies of the notaries of the *arrondissement*.

"15. The interdiction or nomination of a council shall take effect the day the judgment is delivered. All acts committed and concluded after the interdict or appointment of a council shall be null and void.

"16. The acts committed previously to the interdiction may be annulled, if the cause for interdiction notoriously existed previous to the period when these acts were affected.

"17. After the decease of an individual, the acts done by him cannot be attacked or abrogated on account of madness, except inasmuch as the interdiction has been pronounced or set on foot before his decease, unless the proof of madness itself results from the act sought to be invalidated.

"18. If there is no appeal from the judgment of the Tribunal (of *première instance*), or if it be confirmed on appeal, the court shall proceed to the nomination of a guardian, or a surrogate guardian, of the interdicted, according to the rules in the law *De la Minorité*, &c.; the provisional administrator shall then cease his functions, and render all account to the guardian, unless he be himself appointed guardian.

"He himself shall be examined at his own residence, by one of the judges deputed for the purpose, assisted by the registrar.

"19. The husband is of right the guardian of his wife when interdicted.

"20. The wife may be named guardian of her husband, in which case the 'Family Council' will regulate the forms and conditions of the administration of the guardianship, having recourse to the

attend them at their own cost; they will have notice when permitted to attend.

"15. Same here when necessary — sometimes interim committees are appointed.

"16. Acts of lunatic may be impeached within any reasonable time.

"17. After his decease, and within any reasonable time, his acts may be impeached, though not *prima facie* lunatic acts, and though no inquiry as to his state of mind in his lifetime has been instituted.

"18. When committees appointed, interim committees resign, &c.

"19. Not of right, only if he is the most fit person. (Phillips, p. 278.)

"20. As above—security taken from committees for good conduct, act under advice of Master in Lunacy, and are removeable for misconduct.

tribunals on the part of the wife, should she think herself injured by the resolution of the 'Family Council.'

"21. No one, with the exception of the husband or wife, or the relations in the ascending or descending line, shall be obliged to keep the guardianship of an interdicted person beyond ten years. At the expiration of such a time, the guardian may ask, and ought to obtain, a substitute.

"22. The interdicted person is similar to a minor. The laws which regulate the guardianship of minors equally apply to the interdicted.

"23. The revenues of an interdicted person ought essentially to be employed to soften his afflicted condition, and to hasten the cure. The 'Family Council' may resolve (according to the character of the malady and the state of the fortune) that he shall be treated at home, or placed in a private hospital, *maison de santé*, or even in a public hospital.

"24. When the question shall arise for the marriage of the child of an interdicted person, the dowry or portion of the inheritance to be advanced, and the matrimonial agreement shall be regulated by the 'Family Council,' allowed by the Court on the conclusions of the *Procureur Impérial*.

"25. The interdiction ceases with the causes which determined it, nevertheless the (*main levée*) *replevy*¹ cannot be pronounced without those forms be gone through which were necessary in pursuing the interdiction. The interdicted person cannot resume his rights until the *replevy* shall be pronounced.

¹"So translated in all works of authority." (An absurd translation, whether common or no.)

"21. No such absurd rule—the most fit person being chosen, is removed when he has no inclination to remain, or becomes unfit. (Phillips, pp. 278, 353.)

"22. So in England.

"23. So in England—the allowance for the maintenance of the lunatic, and the management of his estate is based on the same doctrine; the committees of the person and estate, are in lieu of the 'Family Council.' They are generally the nearest relations or connections of the lunatic, and are under strict supervision by the court. (Phillips, p. 303.)

"24. The L. C., acting as a good paterfamilias, may so deal with a lunatic's property, if he be found so by inquisition. (Phillips, pp. 332, 333, 334.)

35. So in England—there must be a supersedeas. (Phillips, pp. 359, 360.)

THE FAMILY COUNCIL.

"1. The Family Council shall be composed (exclusive of the justices of the peace) of six of the relations by blood or marriage, chosen either in the parish where the council is convened, or within the distance of two *myriamètres*,¹ half on the maternal, half on the paternal side, and following the order of nearness of relationship. A relative by blood shall be preferred to one by alliance of the same degree (a brother to a brother-in-law for example), and among relations of the same degree the elder shall be preferred to the younger.

"2. The brothers of the same blood and the husbands of the sisters are alone excepted to the limitation of number of which the council is to consist. If there are six or more they shall all be members of the Family Council, which they alone shall form, together with the widows in the ascending line, and those in the ascending line who have right to be excused, if such there are.

"If the brothers and brothers-in-law be less than six, the other relations shall only be called to complete the council.

"3. When the relations by blood or marriage of one or other side are not in sufficient number on the spot, the magistrate shall call other relations by blood or marriage, either domiciled at a greater distance or in the parish² itself, persons known to have been in the habits of friendship with the father or mother of the person to be interdicted.

"4. The magistrate may, however, even when there are present on the spot a number sufficient of relations by blood or alliance, summon at whatever distance relations nearer in degree of relationship or of the same degree as those present; in such a way, however, that some shall be removed of these last, so as not to make the council exceed the number before named.

"5. The time for appearing shall be appointed for a fixed day by the magistrate (*juge de paix*), but in such a manner that there shall be always between the citation and the day appointed for the meeting of the council an interval of at least three days, when all parties reside in the district, or within the distance of two *myriamètres*.

"6. If however, among the parties summoned, some shall be found domiciled beyond the regular distance, there shall be an interval of one day for every three *myriamètres*.

"7. The persons, whether relations or friends, who are thus cited, are to appear in person or by a substitute especially appointed. The substitute cannot represent more than one person.

"8. Every relation by blood or alliance, or friend thus cited, and who shall not appear without legal excuse, will incur a penalty of not more than fifty francs, to be declared without appeal by the magistrate.

"9. If there be sufficient *excuse*, and it is *agreed* either to wait for the absent member or to replace him, in such a case, as in every other

¹ Rather more than six miles.

² The word parish is the nearest approach to "commune."

where the interest of the person to be judged seems to demand it, the magistrate may adjourn or prorogue the meeting.

"10. The council shall be held of right in the house of the magistrate, unless he himself point out another place. The presence of at the least three-fourths of those summoned will be necessary for these deliberations.

"11. The family council shall be presided by the magistrate, who will have the right to discuss questions, and have the casting vote in cases where the opinions are equally divided.

"12. If the person to be interdicted is domiciled in France, but possesses property in the colonies, the special administration of his property shall be given to a protutor. In this case the guardian and the protutor shall be independent one of the other, and not responsible for their several management of property.

"13. The guardian will act and administer as guardian from the very day of his nomination, if it takes place in his presence; if not, from the day on which the appointment shall be notified to him.

"14. The guardianship is a personal charge which does not descend to the heirs of the guardian; these will only be responsible for the manner in which the affairs have been conducted, and, if of age, are bound to continue the guardianship until the nomination of a new guardian.

"Now, on considering the practice in the two countries on this most important subject, it must be obvious that much is done for the protection of the lunatic, but there is no graduation of restriction; all found of unsound mind are equally interdicted, though they might go about with impunity, or where their unsoundness of mind was perfectly harmless. I would, with great humility, call your Lordship's attention to the clause in the French Code, which might, after the consideration of the law officers of the crown, be modified so as to lessen the extreme penalty of 'unsoundness of mind'—confinement in a lunatic asylum for a series of desolate years.

"This clause is especially intended for those cases in which a young man of weak intellect is destroying his property and lavishing his means childishly, and yet is in the enjoyment of good bodily health, and able to appreciate the good things of this world. I purposely abstain from examples, because it would make this paper too long.

"The clause is this :—

"On rejecting a demand for interdiction, the tribunal may, nevertheless, if circumstances require it, order that the defendant shall not hereafter plead, compromise, borrow, receive personal property, purchase, or give receipts, alienate or mortgage his property, without the assistance of a council, who shall be appointed at the same time."

"Undoubtedly it often happens that a man is of too weak a mind to transact affairs without being taken in or cheated, and yet quite able to enjoy uncontrolled the comforts of life, being prevented only from being ruined, by being obliged to consult a wiser head in cases of importance."

The "Family Council," and the provisions above described, form a system which in comparison with that existing in England does not

seem to command such advantages as to induce us to prefer it. It is nevertheless useful to be able to test one system of law by another, and especially so in this case, as that which exists in relation to lunacy in England is admitted to be by no means perfect. Hints (and nothing more) may possibly be taken from the practice in France. Except as possibly suggesting these, Dr. Seymour's pamphlet is worthless.

The Claims of Ragged Schools to Pecuniary Educational Aid from the Annual Parliamentary Grant. By Mary Carpenter. London: Partridge & Co.

MARY CARPENTER has a right to be heard on this subject, for she knows by personal experience, and through personal labour and sacrifices, what Ragged Schools are, what they do, and what they want. We, in these pages, have also a right to demand a hearing for her, because the subject of Ragged Schools and the Reformatory are closely connected with those of crime, the criminal courts, and the prison. Until we grow hardened by the repeated spectacle of the criminal dock, our heart is dismayed with the number of those who, assize after assize, occupy it—at that constant succession of criminals evidencing the fertile causes of crime, some of which are known to be removable, yet remain unremoved.

It would be dull repetition of established truths—recognized by all whose attention has been directed to the subject, and whose judgment is worth regard—to affirm that the vitiated thousands of children in the land, who are born in abject poverty, and nurtured in ignorance and squalor, form the bulk of the “dangerous classes,” and fill our jails. Both in and out of prison they live on the industrious classes. The practical philanthropist, in providing some instruction and exhibiting some care for their welfare, is doing service to the state, not only to be reckoned by positive advantages obvious to the practical eye and the sensitive purse, but in respect of preventing evil which is incalculable.

The author of the pamphlet before us pleads for *efficient aid* from the Committee of Council on Education; now this committee is rather a troublesome body to deal with, red-tapish and crotchety; yet they have, it must be remembered, difficult duties to perform—difficult in themselves, and not rendered lighter by having to confer in a multitude of cases, with impracticable and unbusinesslike people, who rush up from parsonages with more wants than wit.

But let us see why the Committee of Council object to lend the aid of national funds for Ragged Schools. We read:—

“*First*, that in giving educational help, an officer of the State ought not to take it for granted that there would be permanently a Ragged School class in the country, and therefore ought not to make provision for it.

“Surely this is not the principle on which the Government of our country is carried on! It ‘arises from a wrong state of things’ un-

questionably, that the Ragged School exists ;—it arises equally from a ‘wrong state of things’ that the pauper class exists ;—that thousands of our countrymen and women annually find it impossible to obtain an honest living in England ;—that the sanitary condition of our large towns is such as to perpetuate disease both of body and mind ;—that crime is constantly committed even in open day. And does the Government of our country remain passive, and allow of the existence of dreadful evils, because these *things ought not to exist* ; and does it not become a statesman to do something more than ignore them ? Should he not rather grapple with each evil in such way as appears most for the good of *society in general*, and for the *individual concerned* ? Does not the Government provide in such way as seems best for the necessities of paupers ;—aid in the emigration of those whose labour will find a better market in more distant parts of the kingdom ;—grapple vigorously with the unwholesome condition of streets and alleys, and even of private houses ;—and, with respect to the thousands of criminals who annually spring up afresh in our country, does it not withdraw them from society, feed and clothe them, and otherwise provide for them, even at the risk of appearing thereby to discourage the honest labourer, who has often a far more scanty fare for himself and family than the pauper and the felon. No Government does act on such a principle in other matters—why should it do so in respect to the ‘something rotten in our State’ which poisons its very core, the millions of untaught children who neither can nor *will* avail themselves of the higher educational establishments ?

“ Happily such is not the opinion of so distinguished a statesman as Lord JOHN RUSSELL, who, when addressing a Ragged School at Sheffield, in 1857, thus spoke :—

“ ‘ It is absolutely necessary, as it appears to me, that for the present, at least, the voluntary efforts of those who love mankind, and have a feeling of regard for their neighbours, and for the *safety of society*, should combine in endeavouring to provide by what are called *Ragged Schools*, and by *Schools of a similar description*, a supply for the wants to which I have adverted. I believe that if these wants are supplied, although we can never hope in our most sanguine expectations that temptations will not divert many from an honest and religious course, yet that the number of those who are sent to prison, who, not having originally vicious inclinations, have been perverted by bad example and the circumstances of their position—that the number of those who are criminally punished *will very sensibly decrease*, and *society be a great gainer thereby*.’

“ *Secondly*, it was objected that the ‘children of Ragged School classes were in general not the children of parents who *could* not pay, but rather of those who *would* not pay.’ This was asserted in reliance on the inquiries which had been made. More extended inquiries, made in other quarters, would certainly have elicited very different results. The fundamental rule of the London Ragged School Union is, that no children shall be admitted who can attend the higher schools. Such is the general principle of admission throughout the kingdom. Of course it rests with the managers to exclude such children as can go elsewhere, and to keep the school down to the class intended.

“ The third and last argument against giving educational aid to

Ragged Schools is, that the doing so might make them permanent institutions, and *draw down other schools to them*, instead of raising the class received by them.

"It would indeed be right that a Government should guard against such a danger, *if it really existed*. But we believe that such a danger is *purely imaginary*. During the twelve years that Ragged Schools have been in operation, we have never heard of a single instance of a National or British School being drawn down to the condition of a Ragged School, or of its injury from the proximity of one.

"The Certified Industrial Schools are proposed as a substitute for Ragged Schools. They can never take that position, because a large proportion of the children which attend the latter do not in any way subject themselves to police interference, nor would it be at all desirable that parental responsibility should be withdrawn unless when absolutely necessary for the child's welfare. But these are placed in even a worse condition than Ragged Schools by the Minute of Dec., 1857. The only additional aid given is £5 per annum for the food of each child sent under Magisterial order; this will barely suffice for food; clothing and sleeping accommodation must also be provided with extended industrial training. It cannot be expected that voluntary effort will undertake what ought to be done by the State for children under its sentence."

Now our pages are not influential, we fear, with the members of the Committee of Council on Education. But many of our readers know the nature and history of juvenile as well as of other crime, and they know, we trust, what it is to contribute to the taxes annually, nay, perennially, perquarterly, and perpetually required for government purposes. They will agree with us, that in aiding such persons as Mary Carpenter to educate the poorest children, and to lift from the deepening slough of ignorance and wickedness the miserable offspring of the unfortunate and degraded, the produce of taxation is better employed than in paying policemen, building jails and "repressing crime" generally.

We commend the pamphlet we are now noticing to the attention of those of our readers who concern themselves in matters touching the interest of the poor, and the cause of and cure for crimes.

The chief difficulty in effecting good in these affairs, we have always believed to be the finding of men and women who can and will give themselves to this sort of work. It is the human soul in the few who are active and thorough, by which worthy deeds are wrought. Government, or rich contributors can provide money for any good purpose; but nought will come of it, unless there be a genuine spirit to direct the scheme and carry out personally the object. Ragged Schools are not got up for amateurs' amusement or dilettante display. Their character forbids the idea of mock philanthropists having much to do with them;—they exist through the hearty zeal of honest, brave, and working members of society. Having these, and Government having funds at their disposal for educational purposes, we claim that these schools shall not be cut off from a share of these funds, of which

the narrow and mistaken views of those who officially dispense national monies now seem disposed to deprive them.

The Universal Review for July.

WE introduced to our readers last quarter this Monthly Review, as promising to supply a possible want they might feel, of a periodical claiming to possess some genuine and thoughtful essays on literary and social topics. We think the promise is being duly performed. Differing as we do from several of the writers in the periodical, we nevertheless welcome an intelligent and not hackneyed treatment of most of the subjects. Perhaps we may except from our praise the article on Modern Divorce, which reproduces a good deal of the pseudo-moralists' twaddle, abundant just now in certain circles, especially those under clerical inspiration. So long as Divorce was afforded under ecclesiastical and parliamentary sanction, and was cruelly, inefficiently, and partially applied, it was allowed to work in peace; now it shocks all morality.—“Those who have watched, with the eyes of moralists and well-wishers to the society in which they live, the proceedings of the new Divorce Court, must have begun to feel serious alarm at the influence which the fatal facility it affords for dissolving marriages, and for the marriage of participants in guilt, is calculated to exercise.” And then follow the statistics familiar to most of our readers, and which show that what was the privilege of the few is now the right of all who, without the modern Divorce Court, would have been condemned to the worst of all human afflictions—a faithless and vicious husband or wife, and this for life. Therefore the writer laments and cries aloud for English morality. We do not purpose here to enter upon the discussion; we refer to it chiefly as showing how far a cry will reach when it is apparently moral (though really un-moral), and emanates from quarters where gravity and respectability are supposed to dwell. Here we find a periodical, which commands generally great talent, permitting a temporary abrogation of reason and common-sense to be evinced, that fallacious and commonplace morality may be preached.

“Illogical Geology” is a timely and able essay not unwanted, and we commend its perusal to those of our readers who, in the ensuing vacation, will be practically and theoretically interesting themselves in geological pursuits.

With the *résumé* of party politics we have nothing to do. It is not denied that it is written in obedience to party feelings.

Crabb's Precedents on Conveyancing, Common and Commercial Forms. (Edited by J. T. Christie, Esq.) Fifth Edition, by Leonard Shelford, of Middle Temple, Esq. 2 vols. London: Butterworths, 1859.

MR. CHRISTIE'S edition of Mr. Crabb's well-known and much-used book appeared in 1853. A new one, now edited by Mr. Shelford, is

just published, but has come to our hands too late for a more extended notice than the present. We will, however, for the behoof of our conveyancing readers state, that in respect of the quantity of matter furnished, the volumes show very considerable, but not unnecessary, increase. Indeed, about one-third more of pages are here added, and the whole work has been carefully revised.

Those who have been in the habit of using Crabb's work will know that his "Prefaces" contain practical observations of considerable utility to the professional man. The flow of time carrying with it many changes, and some reforms in the law relating to conveyancing, have imposed the obligation upon Mr. Shelford of carefully revising all, and in many instances has rendered it expedient for him to re-write not a small portion of some of these prefaces.

Mr. Shelford has also had to exercise, and we doubt not with correct judgment has exercised, his discretion as to where he should reject *Forms* which he deemed it advisable to omit, and where he should revise them, or introduce new ones to meet the modern exigencies and characteristics of conveyancing. To this important part of his duty—the remodelling and perfecting of the *Forms*—even with the examination which we have already been able to afford this work, we are able to affirm that the learned editor has been eminently successful, and effected valuable improvements.

Further, "Crabb's Conveyancing" originally contained, and succeeding editors, including Mr. Shelford, have preserved many *Forms* which we do not find in any other collection of precedents. These principally relate to commercial arrangements and dealings, such as are generally, to the dismay of the conveyancer, pressed far more than any other in hot haste by those who seem to think that lawyers should be like post-horses of old, ever ready to do any journey, and undertake the safe carriage of any important freight, at any time, any speed, or any occasion, and then be abused afterwards.

Reserving for future criticism these and other volumes before us, we will only mention the advantages which, both to the critic and to the practical lawyer, accrues from such a convenient and well-devised table of contents and ample indexes, including one to the Prefaces, as we are glad to see in the new "Crabb's Conveyancing."

PARLIAMENTARY REFORM.

Should the Colonies be Represented? By T. C. Mossom Meekins, B.A., of the Inner Temple, Barrister-at-Law. London: Butterworths, 1859.

MR. MEEKINS has in this pamphlet revived a very important subject, and one which must be taken into consideration one day, either when principle has obtained supremacy in the councils of the realm, or when by necessity the discussion of the question becomes inevitable. There is also a third period, perhaps, when the matter

may be gone into; viz, when it is too late. But the alienation of colonies, and the mismanagement of our dependencies, are now known by fatal experience to be subjects of too deep importance, we trust, to prevent the delay being continued to the epoch last referred to.

Mr. Meekins cites ancient constitutional precedent—the opinion of Burke, Franklin, and other great statesmen, in favour of his view, that the British colonies should be represented in parliament. He points to the dangers indicated by Lord Grey in one of his essays, and to the exposition by De Lolme, of the evils of multiplying parliaments. He adverts to the commercial reasons which should weigh much in regarding this subject, as well as to the absolute *rights* to representation which our colonies possess, in common with the rest of her Majesty's subjects.

We presume the main obstacle to the views advocated by Mr. Meekins being entertained seriously by the imperial power, is the Colonial Office. We can well believe that this "Department" will find it very annoying to feel the control and interference which the knowledge of colonial subjects by independent members for the colonies, and the opportunity of bringing proper topics before the House, would necessarily excite. Nevertheless, it would be found very wholesome, we trow, if the influence of the interested parties in the colonies could be brought to bear on the British legislature.

Private Bill Legislation. Can any Thing be now Done to Improve it?

By Alexander Pulling, Esq., Barrister-at-Law. London: Longman & Co., 1859.

THE main part of this pamphlet has already appeared as an article in the *Edinburgh Review*; but it well merits reprinting, especially as the author has now added thereto suggestions for practically remedying the notorious evils connected with the present private bill procedure. "The evils of our private bill system have been often denounced by law reformers, dealing with the question theoretically; by members of the legislature, practically conversant with the subject; and by those who were personally interested in securing an effective and less costly mode of investigating schemes for purely commercial undertakings; by Bentham in his writings, by Lord Brougham in his speeches, and by indignant directors and disappointed shareholders without number. Hardly any denunciation of the system, however, can be stronger than that of the Committee of Private Bills of 1846 (H. C.)," which reported that the public, being unrepresented in most important proceedings affecting its interest, a Committee of the House is often dependent for information upon those whose intended representations are least likely to assist any body of men in their investigations. Moreover, "provisions of the most objectionable nature, some varying, and interfering with the general statute or common law of the country," are recklessly introduced into these bills, and evils grave in character, and extensive and uncontrollable, are the rule and

not the exception in private bills. Lord Brougham's proposition, to establish an independent tribunal in substitution for a select committee, and to which every private bill should be referred, was made in the House of Lords in 1846. Lord Belper submitted to the committee sitting on the subject in 1858, to appoint a permanent commission on all *railway bills*, which should encourage the office of *advising* on the bill. But parliament, despite the acknowledged mischief occasioned by the present system, is too jealous to adopt either of the courses thus suggested, and Mr. Pulling now offers a plan of his own, with the object of improving, both in respect of augmenting the accurate investigation of the merits of private bills, and diminishing its cost. He suggests, that a certain number of *Examiners* should be appointed, whose office it should be to inquire in the case of each bill, as to the compliance with the standing orders, and into the facts alleged and the evidence to be adduced in each case. The examiner should then make a *Report* upon the scheme, its advantages, its objectionable features, and how far its proposed provisions affect the general law of the land. This report, Mr. Pulling thinks, would guide the discretion of the legislation in the various stages which the bill would pass through, while it would not interfere with the constitutional privileges of the House, which would still appoint a committee, whose judgment should be aided, but not superseded by the examiner's report. We are afraid that the jealousy of the privileges of the House being invaded, would not be assuaged by this modification of the propositions of Lord Brougham and Lord Belper. The examiners would either do too much or too little to please the House. If they founded their Report on the entire consideration of the project before them, the committee who received it would themselves have to survey and weigh the evidence in a disputed case, to repeat the processes already gone through, and constitute themselves into a court of error, unless they simply adopted the official statement and countersigned the judgment therein expressed. This would probably be held as giving the examiners too great power; but they would do too little if they merely abstracted the evidence, and performed the unsatisfactory part now played by examiners in Chancery. Whatever design is carried out, care must be taken that two investigations are not made requisite, and doubled expense encountered.

Another suggestion made by Mr. Pulling is, that Parliament should sanction the insertion in private bills of *certain general provisions*, as in the case of inclosure of waste lands, the incorporation of joint-stock companies, the regulation of railways, &c. It would doubtless produce much more harmony in our legislation if there were effected a consolidation of the various sets of clauses requisite in personal and private acts, and usually there found.

During the late session there has been a great abuse on the private bill legislation. Thus, "the Red Sea Telegraph Bill" was introduced last season as a *private bill*, and it passed the lower House. This "private bill" contains among other things a government guarantee of

4½ per cent. on £800,000 for fifty years. It was slipped through the House unobserved, and on its reintroduction the principle was challenged; but it was urged that already had public good faith been pledged, and the government stood committed to the company. We do not here refer to the intrinsic merits of this company's design; but it is clear that thus by private bills it is open to government, by subsidies and corruption, clandestinely to carry out projects both unconstitutional and mischievous. The debate on this subject (July 11), in the House of Commons, is very instructive; both as to how the general business of the country is carried on, and especially that relating to private bill legislation,

Events of the Quarter.

THE LATE JUDICIAL APPOINTMENT IN THE QUEEN'S BENCH.

It would be affectation in us not to advert to the recent appointment of Mr. Blackburn to the Bench. That which has been a common topic in the whole profession—which has startled the public and been commented on by the press, openly and in distinct language—is not a subject from the discussion of which we shall shrink.

It is true, as has been stated, that among the members of the Bar Mr. Blackburn was comparatively but little known—to the public, not at all—to Lord Campbell, as he has in the House of Peers asserted (if he be correctly reported), only as a learned counsel to whose arguments he has occasionally listened, he does not say how often, *with pleasure*. Mr. Blackburn, however, has been known since 1853, conjoined with Mr. Ellis, as a reporter in the Queen's Bench. We are not making any improper professional reflection upon Mr. Blackburn, when we say his practice was of a very limited character, although he has been now for twenty years called to the bar. He attended at the Liverpool sessions, and the local civil court at that city, but took no leading part there. At the assizes he appeared annually in a few cases in the same city. At the same time, he was undoubtedly known by those with whom he was brought into connection, as an industrious man, a diligent and sound lawyer, whose learning and abilities, from various causes, had too little scope in the profession to be fairly tested in a practical form. Apart from any skill as a *Nisi Prius* advocate (which he never had sufficient opportunity of maturing), he was such a man, that if attorneys had the means or ability of selecting the best men for their work, instead of being compelled by interest, or attracted by notoriety to the comparatively few who are overworked, they would have been found consulting Mr. Blackburn, and employing his talents for their clients' causes, more than in fact was the case. Far be it from us to allege that, as a rule, the best men have the most clients. We should as soon lay down the rule, that the most honourable and intelligent merchants were the richest, or the most virtuous and estimable woman had the most numerous body of suitors. Nevertheless, we do commonly find a certain measure of success attending marked capacity, and a certain degree of credit attached to proved ability, and the habits which this success brings with it, is, especially in the practice of the law, an important preparation for any commanding position to which it may ultimately lead. Of two men, equal in talent and learning, the one who adds to his other acquirements large practice, and thus demonstrates his power to apply his

knowledge usefully, is undoubtedly to be preferred to perform the high functions of his profession, such as belong to the judicial office. Nor can it be for one moment said, that there were not, in respect of reputed learning, men at least equal to Mr. Blackburn, and of longer standing, and of whose practised powers both branches of the profession were better assured. A Lord Chancellor, like any trustee, is bound to be able to justify an appointment of this character, not by his *hopes*, but by the *knowledge* of fitness, which he in common with the profession possesses of the person promoted. The principle is altogether vicious which admits of a chancellor acting on his own private impressions, and being indifferent as to public opinion, on such a matter as this. If this non-responsibility be admitted the door is at once opened to favouritism, nepotism, and that offensive use of patronage from which hitherto judicial appointments have been free. Any thing approaching a job in these appointments, is indeed a crime of the gravest character; none the less heinous, because no especial penalty is attached to it, or because in the hurried course of events, it seems soon to pass into oblivion, or because there is no recognised power of compelling retraction. When Lord Chelmsford made an appointment (which, in the opinion of many, was at least as appropriate as that he was subsequently obliged to substitute for it), the rancorous attacks of his political opponents, and the greediness and disappointment of his own party, were brought to bear upon his kindly nature, and he yielded his own judgment—we will not now inquire whether rightly or no—to what he supposed to be a general expression of opinion. Lord Campbell was more (or shall we say less) fortunate. He thrusts an almost unknown man into one of the highest judicial offices, and though throughout English society the act has excited dismay and disgust, and throughout Scotch society has raised astonishment, while it has induced prudent silence—there is no possibility of appeal, or this appointment assuredly, like the former, would hardly have been confirmed.

Shall we therefore, out of delicacy to the new judge, hesitate to tell Lord Campbell in print, what, with *one* exception, we have heard spoken both in and out of the profession? Shall we refuse here to record that such an appointment (and it was Lord Campbell's first) is a disgrace to the Lord Chancellor of England; and this whether or no Mr. C. Blackburn turn out eventually an average good judge?

But it will be said, "Read the testimony of certain noble peers in the House of Lords." Exactly so. And we would observe this is the only occasion that we know of when a Lord Chancellor has been obliged to explain and defend an appointment of the kind in the House. May it be the last! The discussion in question, however, cannot be considered very satisfactory to Lord Campbell, though certain law lords do think it amiable to apply the whitewash in redundancy. Lord Lyndhurst remarked, "It is of great importance that the public should not entertain any doubt or jealousy with respect to appointments to the judicial bench." The noble lord, indeed, who admitted that every one was asking, "Who is Mr. Blackburn?" volun-

teered the statement that he "was an admirable arguer of a law case." Without doubting the statement, we may say that we much doubt if Lord Lynnhurst ever heard Mr. Blackburn argue any case. In fact, the whole of Lord Lyndhurst's remarks (and they were more than what meets the eye in the Report) seem very much like "chaffing," if we may be allowed to use the phrase. This is more especially seen in his ironical congratulations of Lord Campbell on his appointment to the chancellorship. In making a quotation from Macbeth, he just stopped short in time.

The conclusion of the quotation we furnish in italics—

"Thou hast it now, King, Cawdor, Glamis, all,
As the weird women promised; and I fear
Thou play'st most foully for't."

How the noble speaker must have chuckled at the close approach of the compliment to an unpleasant reflection.

But Lord Campbell, thus called on to explain the appointment, said:—

"I know nothing of Mr. Blackburn except what I know from having seen him practise in the court over which I presided. I have no private intimacy, and I declare on my word of honour I don't know of what side he is in politics." It is not alleged that the appointment was made on the ground of politics. Lord Campbell's "word of honour" is here, therefore, quite unnecessarily pledged. But we miss this solemn asseveration in his disavowal of "private intimacy;" we must presume, however, that he meant to declare with equal force that he was not privately acquainted with Mr. Blackburn: neither hospitably entertaining him, for example, on divers occasions, or in other ways giving him the privilege of his countenance and conversation.

It is idle, we may observe, to compare the appointment of such a stuff gownsmen as Mr. Blackburn with that of Mr. Justice Crompton or Mr. Justice Willes, both of whom had practice and experience on a large scale for a long period, and the highest renown in the profession for many years.

CONSOLIDATION OF THE LAW—THE LATE (?) STATUTE LAW COMMISSION. —The practice of the legislature with regard to the consolidation of the statute law would be ludicrous if it were not melancholy. We have just now too many political pretenders appearing before the public in this matter. There is too much futile, because misdirected labour exhibited; too many uncongenial, disunited, and, we may add, incapable minds, busy in begetting cripples, delivering abortions, or boldly pledging themselves to produce, on a future occasion, vigorous and healthy offspring, which, however, never see the light. In respect to those who delight in such promises, we would observe that they being themselves neither able nor willing to execute their engagements, the only chance left to them is to endeavour to effect their purpose by deputy. But no one will give credit to unknown and irresponsible delegates. Then what is the result? Nothing but illusion and distrust—waste of labour, and eventually despair.

The facts connected with the doings of the Statute Law Commission were fully considered in our last number, (Art. IX.) Since then, a return to an order of the House of Commons of February last has been made, from which it appears that the sum of £20,000 sterling has been expended by Lord Cranworth's experimental Board and the Commission, and further, that the Commission met *twice* in 1858, and *once* in the course of the current year! The return occupies fifty-two blue-book pages—the greater portion of the contents of which, viz., forty-four pages, had *already* appeared in their prior return of 1857. This is a remarkable but not singular instance of absurd and disgraceful waste of public money. It is true that, without this repetition of forty-four pages, the miserable exhibition of the lethargy and impotence of the commission would have been rendered too palpable, even to the eyes of its few and hardy supporters.

A fourth report of the commission was published in June last. We need hardly say it is utterly valueless. It, however, notices that the classification of the public general statutes has been completed from the 41 Geo. III., U. K., down to 21 & 22 Vict. It has been printed, and occupies two heavy folio volumes, copies of which have been duly distributed among the members of the Upper House, who, of course, during the ensuing recess will examine them closely.

Probably the gentlemen who undertook the duty of compiling the register, have performed it efficiently, especially as their salaries in respect of the work in question amount to £2000. We should certainly have volunteered an opinion, that this costly register was of no advantage had not the report assured us, that, from the lack of such a work, the Court of Queen's Bench had fallen into an error of considering minutely the language of a statute which had been repealed fourteen years before, and that the legislature itself had, on one occasion, repealed statutes which had been already repealed. These notable facts Lord Cranworth also mentioned to the House in debate, on the 18th July; but the Lord Chancellor nevertheless explained, that unless this register was carried back to Magna Carta, the labour would be in vain. We may also mention that the mode adopted by the compilers, of registering statutes as repealed "in part," without pointing out what part, will by no means lighten the labour of future consolidation. Moreover, their remarks are occasionally delivered with so much hesitating modesty, that they afford no certain information.—(*Vide, e.g.*, the printed specimen annexed to Third Report, p. 13, cap. 23.)

The Fourth Report further states, that the "register may be used as the foundation for a new edition of the statutes passed since the union, the advantages of which to the public would be considerable, even if no consolidation were effected;" but the commissioners coolly add, that the register in an important point is *imperfect* as a foundation for such a purpose; for enactments repealed by implication are *not* placed within the category of repealed statutes; and "it would be necessary, therefore, to employ an editor *competent* to the task of revising the statutes with reference to these questions!" For what purpose then, we may ask, has Mr. Bellenden Ker received his £1000 per

annum these many years—or why is he *now* deprived of his salary, when a “competent” editor is still required?

Curiously enough we read at the close of the report, that the ninety consolidation bills prepared under the direction of the Commission, require further consideration; and it is modestly proposed that a lawyer, one of “eminence,” “should be selected by her Majesty, who should devote his whole time and attention to superintending the work” of revision.

We regret to see such names as those of Stanley, Lyndhurst, Brougham, Wensleydale, and Coulson, good naturedly (but we think erroneously) allowed to be appended to such a report. Others, such as the present Lord Chancellor, the Lord Chief-Justice of England, the Lord Advocate, Mr. Walpole, and Mr. Napier, have withheld their authority from the document in question.

On the occasion of Lord Cranworth making a laudatory speech when he introduced five bills (for the especial purpose of their *not* passing, although they originated with this precious Statute Law Commission), he entered upon some of the discussions connected with the subject, which are, alas! but too familiar to our readers, and to all law reformers. He elicited, however, from the chancellor one piece of valuable information; viz., that the Commission was at last considered by the government inefficient enough to be doomed to immediate destruction. It had indeed been previously mentioned that Mr. Bellenden Ker’s salary was already stopped (the date, however, being uncertain), and there were not wanting those whose shrewdness—taking the form of uncharitableness—led them to infer thereupon, that the life of the Commission itself would not be much further prolonged. It will always, however, be a melancholy satisfaction to those interested either pecuniarily or otherwise in the fate—we do not say success—of the Commission, to recollect the graceful compliments and amiable sympathy which followed its last days. Prejudice and ignorance, we have been told, had induced some to doubt Mr. Ker’s merits as a commissioner. Like qualities doubtless, with an addition of malice, have prompted men to deny that the Commission, in its various phases, has wrought any thing of practical advantage; though it has filled the place which others might have usefully occupied, and blocked up the avenues, and broken about and thrown doubt on the roads which others might have trodden, and who might have had some chance of reaching the goal. Whatever wounds may have been inflicted on the feelings of the commissioners through blindness and spite, have been amply compensated for by the handsome manner in which the commissioners have been spoken of in the House of Lords, where the habit of compliment and adulation, in cases where it were better to avoid them, is just now much indulged in. “The commissioners have done *everything* they *could* do.” Granted—But this turns out to be *nothing*. “Are ninety bills, then, nothing?” Yes! for they are bills which no one trusts; and no one dare ask the House to pass them. Is it not obvious that, if the work so ostentatiously pointed at be of any credit, the abolition of the Commission at its

culminating point of service is an extravagant blunder? It is clear that either the Commission has been ungratefully handled and maligned, or the public infamously plundered, and its interests cruelly abused.

What is thought of the matter by the present Attorney-General (who seems to be the only man of the present day capable of carrying out any great measure of reform), may be perhaps gathered from a remark made by him in the House on 30th June last, which was to the effect that "we had had for several years a Statute Law Commission, but with the exception of some bills laid upon the table, upon the day before the dissolution of the last parliament, by the *late* Attorney-General, that Commission had not produced a single measure." These remarks of the Attorney-General were elicited upon the introduction by Mr. Whiteside of twelve bills to consolidate and amend the Criminal Statute Law of England and Ireland. We need hardly inform our readers that these *twelve* bills did not reach a maturity ripier than that attained by the *seven* bills of Sir Fitzroy Kelly, to which the Attorney-General alluded as above.

Mr. Whiteside could not have expected, and Sir Fitzroy Kelly never intended, to carry their respective projects further than the stage at which they naturally stopped. It appears to be a habit into which those who would acquire at a cheap rate the reputation of law reformers fall, to parade ostentatiously bills which not only could not be adopted by the legislature, but which would not even bear its investigation. No one, however, does give the slightest credit to the ambitious gentlemen who pursue this course. These "measures," moreover, are never of such value as to be taken up by any one subsequently. They are simply a grave mockery.

On Mr. Whiteside's acting as undertaker to these bills of his, when he moved their second reading he made a speech. We only refer to it because the Attorney-General, in noticing it, took occasion to say that the present government would, in the next session of parliament, undertake the consolidation of the statute law, and that the criminal law would be that part first introduced to parliament. It is granted that the House of Parliament cannot examine the provisions of a consolidation bill. Parliament is not the proper machine for this purpose. The legislature must give its sanction to any comprehensive measure on the credit and faith of those to whose care it is committed. The Statute Law Commission has not earned, nor does it possess such credit. The Attorney-General has pointed out frequently what is the only course now open to us, that of establishing a "DEPARTMENT OF JUSTICE," which should comprise men,¹ whose sole duty should be to enter upon and carry out the necessary measures, "who should be *responsible*," who should perform their duties after a "different manner to the Statute Law Commission," "and upon whose credit and faith all measures of consolidation should be introduced to parliament." —(*Times*, Par. Rep., July 1st.) Though this is the real step which

¹ "The state of things is this, that we must either forego consolidation altogether, or leave it implicitly in the hands of a few learned and able men in whom we have confidence." —(Lord Brougham, *Times*, Par. Rep., July 19.)

ought to be taken, yet adverse influences seem still to stand in the way of the Attorney-General, who is driven to undertake, in the way he has mentioned, that which we do not think is rightly thrown upon the law-officers of the crown, and of the success of which, we regret to say, we are still not sanguine.

The country has been too long trifled with in this matter, and its interests made subservient to those of private individuals whose incapacity is now confessed.

Under Sir R. Bethell's auspices, we will still hope that new light will be thrown on the darkness in which his predecessors have been groping.

FUTURE LAW REFORMS.—The session now concluding—thanks to the patriotism of the late government in dissolving parliament at the most important crisis of the country's affairs—has been too short to accomplish any of the multitude of the reforms now pending either in promise or threat. The programme for the future session may probably be made out from sundry fair promises of the Lord Chancellor—(House of Lords, July 18th)—from which we gather the subjects of legislation will include bankruptcy, the transfer of real property—equity courts reform, in regard to the vicious mode of taking and “cooking” evidence now in vogue in Chancery—and the assimilation of the practice of courts of law and equity.

The Attorney-General, previously, in a more expanded form, and in answer to a question by Mr. Scully, stated as to the proposed reform of the law touching titles to land, that “the report of the Registration Commission was under the consideration of the Government, together with the very valuable schemes brought in by the late Solicitor-General. A measure would shortly be prepared and submitted to Parliament; but it was impossible at present to state the details, except that its object would be to give effect to the proposition for a registration of titles, and to carry into effect the commissioners’ recommendations.”¹

Be it however remarked, that the “valuable schemes brought in by the late Solicitor-General,” were completely at variance with “the Commissioners’ recommendations.” The considering of the “scheme” and of the “recommendations,” must be therefore carried out in compliment to Sir Hugh M. Cairns, or for the purpose of profiting by the contrast thereby presented.

The Committee of the Four Inns of Court, appointed to consider the whole subject of legal education, have made their report, which will be found in a previous page. The benchers of *all* the respective inns have not as yet given in their adherence to the report. We trust, however, in a future number to be able to inform the profession that the principles and suggestions of this report have been accepted

¹ See L. M. & R. (for May) No. 13, p. 187.

by each of the inns, and that ere long rules will be drawn up in accordance therewith. The profession and the public are under great obligation to the committee, and it is hardly to be anticipated that any bench will hold out longer against the well-considered proposals which have been made, and the general feeling in the profession in favour of them.

THE RECENT ELECTION OF THE JUDGE OF THE LONDON SHERIFF'S COURT.—Some sixteen barristers were found who condescended to become candidates for the office. Some of them, doubtless, repudiated the idea of degrading themselves and the office by canvassing, and adopting the demeanour and trickery which are usual on a popular election—and so they lost their election. We must do the electors the justice to say, that they saw the propriety (not to say the necessity) of purifying in some measure the list of candidates, by adopting a certain resolution which, according to a successful electioneering device, was carried immediately prior to the show of hands. The resolution was as follows:—"That no person be eligible to be a candidate for the office of judge of the Sheriff's Court who has ever been convicted of fraud, or who has compounded with his creditors, or been a bankrupt, or has taken the benefit of any of the acts for the relief of insolvent debtors, and has not paid 20s. in the pound, this court being of opinion that the terms of the 39th standing order, disqualifying members of the court from serving on committees or commissions chosen by this court, or from becoming governors of either of the Royal Hospitals, by virtue of an appointment of this court, should be applied and acted upon in the cases of candidates for judicial appointments under the corporation."

Mr. Corrie, whom the profession would have been willing to see preferred to the judicial office, unfortunately lost the election by two votes, and the scramble for the coveted prize terminated by Mr. M. Kerr's getting it.

PARLIAMENTARY.

THE doings of the new parliament during the short session, now terminating in favour of the moors, must be briefly adverted to. Our main difficulty in alluding to them here, is the uncertainty and incompleteness which attend measures at this period of the session. No one knows what may not be slipped through, or postponed, compromised, or muddled, in the last struggles.

Lord St. Leonards' "*Law of Property and Trustees' Relief Amendment Bill*," having been again carried through the House of Lords, is now in the Commons. The old objection there formerly made to the clause exonerating a purchaser from crown debts upon which process had not issued, may, we fear, be again advanced to the detriment of this truly useful law reform. There is evidently a misapprehension on this matter in official minds. Under the statutes 33

Hen. VIII, c. 39, and 13 Eliz, c. 4, the rights of the crown affect purchasers of freehold property ; 2 & 3 Vict., c. 11, protects purchasers *unless* the obligations we are referring to are registered. The Chancellor of the Exchequer stated in the House, that only bonds of a permanent nature, when the responsibility amounted to £1000 or more to each party to the bond, were registered by the departments of the customs, excise, stamps and taxes, woods and works, the paymaster-general, the national debt, war, and ordnance. And further, that since 1856 only thirty crown bonds were registered on the part of the custom-house officers, who used to register an enormous number. Of course the registration of these bonds only affects *freehold* property. In effect, therefore, for the sake of the possible enforcement of crown claims against the freehold property of a small number of crown debtors (and it is not a striking, but a very certain fact that all crown debtors are not possessed of large freehold estates), every purchaser or mortgagee of every freehold, however small, is put to a considerable expense in making search to secure himself against the contingency of liability to the crown. Well may Lord St. Leonards' say, "It is to be lamented that sounder views are not entertained on the subject."

No opposition was encountered by the "Attorneys' and Solicitors' Bill," in its rapid progress through the Houses of Parliament ; but questionable amendments having been introduced by the Lords, it will require close attention by the legal members of the House of Commons. The object of the bill is "to amend the act for consolidating and amending several of the laws relating to attorneys and solicitors in England and Wales." One of its new provisions is directed to encourage those about to enter the profession to seek a liberal education, and thus raise the standard of intelligence among lawyers. But many other points affecting the lawyer find place in the bill. Instead of "consolidating and amending *several*" of the laws on this head, it would have been expedient, but too reasonable a thing to have given really one good consolidation statute, which here it was possible to have effected.

The Divorce Court Amendment Bill is now in the hands of the legislature. In what shape it may ultimately come out, our readers will know in due time. The Chancellor has expressed his "readiness to pay *all* attention in his power to *any* amendments which might be submitted to his notice before the bill is committed," (*Times Parl. Intell.*, July 21st.) The primary intention of the bill is to increase the judicial force of the court, by including *all* the judges among the assessors of the judge ordinary, when a full court is wanted. Another provision has been introduced at the instance of Lord Brougham, to prevent collusion : the court having the power to call in at discretion the aid of the Attorney-General. Lord Chelmsford took, we believe, a correct view of this Amendment Bill ; he seemed to think it *might* be an improvement, but was not the proper reform—nor that which was called for. He said the court ought to be made entirely independent, and he pointed out the disadvantage of the judge-ordinary not presiding in the full court. On the

whole, the bill is a poor makeshift, a provisional expedient, and a mere experiment; but *something* was to be done, and every-body's wishes to be attended to. There is, moreover, in some quarters an absurd jealousy of the court being made really an effective one. The idea of the "lower orders" coming within its operation, shocks all propriety, and this is a favourite theme with popular preachers and philanthropists, whose care is exclusively applied to the purity and morals of "inferior persons." When the proceedings in the court appear "unfit for publication," it is further proposed to be enacted that its doors may be ordered to be closed, for the sake of public virtue. If the principle of this provision is sound, it should be extended to all our courts, where the same reasons apply. A provision is inserted in the bill, to give the court power to make orders with reference to the custody and maintenance of children.

The opening of the Admiralty Court to the legal profession generally, is a measure at last likely to be carried.

Leave has this session been obtained by Mr. M'Mahon, and Mr. Brady (by a majority of 179 to 173,) to bring in a bill abrogating the law by which Irish students of law must keep terms in the English inns of court. The motion was opposed by Mr. Whiteside and Mr. Malins. The sole question herein involved, refers simply to the welfare of the Irish barristers. That some derive advantage from sojourning in England, while some merely waste time and money here, is and has been notorious to all who have had opportunities of judging. The balance of advantages should be marked by those experienced and interested in the subject. Possibly, however, the English Bench would not be adorned by such men as Martin and Willes, if the ancient practice now sought to be abolished had not existed.

The commitments by County Court judges have of late been much discussed, and Mr. Collier has, in consequence, brought forward a bill on the subject. It has been assumed that the power is occasionally abused, and so it has been proposed by some to take it away altogether. An able letter from a "County Court Judge" has lately appeared in the *Times* newspaper, in which he explained, what is notorious to those who know any thing about the working of county courts, that the power in question is one essential to the useful operation of the law. A common instance will illustrate the law, as the abolitionists would have it. A mechanic known to be in the receipt of £3 a week, and to whom the usual credit weekly or monthly is naturally extended, chooses to repudiate payment, and judgment is recovered. Living in lodgings, and being without incumbrance, he can shift his place of residence as he likes, and, having no chattels to be seized, he snaps his fingers at the judgment against him, and the poor shopkeeper not only loses his debt, but has to pay the costs incurred in his endeavour to recover it. We disagree, we may add totally, both in principle and from experience, with the report of the committee of the Law Amendment Society on this head. We have seen in the daily working of the county courts the multitude of attempts at fraud which are alone met by the pro-

visions of the law relating to commitment, and it is astounding to us to find a popular cry endeavoured to be raised against it on the plea of injustice. A small debt was for years believed by the dishonest debtor to be one which might be successfully evaded, and the frauds which were effected, both in contracting primary liabilities and repudiating them, were advanced as one great reason for establishing small debts courts. If the power of commitment, which is often the sole engine for compelling the fraudulent debtor to obey the order of the court, be taken away, not only will an irreparable injury be done to the administration of justice; but the honest poor man, who in hard times got the benefit of credit, will be deprived of the means of struggling through his temporary difficulties—or will have to pay dear for the risk which the defenceless shopkeeper will run when deprived of the present security afforded by the law.

APPOINTMENTS, &c.

WE have to record that, upon the late re-accession of Lord Palmerston to power, John Lord Campbell, though in the eightieth year of his age, was prevailed upon to accept the Chancellorship; that the elevation of Sir A. E. Cockburn to the Chiefship of the Queen's Bench, and of Mr. Justice Erle to that of the Common Pleas, was hailed with universal satisfaction by the public and the profession; that Mr. Colin Blackburn of the Northern Circuit and Liverpool sessions was unexpectedly raised to the seat on the Bench vacated by Mr. Justice Erle; that the post of Judge Advocate-General was conferred upon Mr. Headlam, Q.C.; and that Sir Richard Bethell and Sir H. S. Keating were reappointed to the respective offices of Attorney-General and Solicitor-General, which they held at the time of the downfall of the Palmerston administration in 1858.

The Secretary of State for the Home Department, Sir George Cornwall Lewis, is a member of the Middle Temple, and was called to the bar in 1831; Sir George Grey, Chancellor of the Duchy of Lancaster, is a member of Lincoln's Inn, and was called to the bar in 1826; Mr. Cardwell, the chief Secretary for Ireland, is a member of the Inner Temple, and was called to the bar in 1838; Mr. C. P. Villiers, President of the Poor-Law Board, is a member of Lincoln's Inn, and was called to the bar in 1827; and Mr. Lowe, the Vice-President of the Council for Education, is a member of Lincoln's Inn, and was called to the bar in 1842.

Mr. W. N. Massey of the Inner Temple, barrister-at-law, has been elected Chairman of Committees of the House of Commons.

W. H. Bodkin, Esq., of the Home Circuit and Central Criminal Court, Recorder of Dover, has been appointed Assistant-Judge of the Court of the Sessions of the Peace in and for the County of Middlesex, in the place of Robert Pashley, Esq., deceased. This is an office created by 7 and 8 Vict., c. 71, under which the Judge is entitled to a salary of £1200 per annum, charged on the consolidated fund, but he is not

precluded from continuing his private practice. A bill was introduced at the instance of the Middlesex magistrates, with the object of preventing such practice, in consideration of which it was proposed to raise his salary to £1500. Amendments have been introduced into the bill, by which the Middlesex magistrates may, if they please, pay the salary of £1500 out of the resources of the county, and impose on the Judge the above condition, or the *status quo* may be preserved. Judging from the present temper of the magistrates, the bill, should it pass the Lords, will be inoperative.

Mr. John Hinde Palmer, and Mr. W. D. Lewis, both of the Chancery Bar, and Mr. A. J. Stephens of the Western Circuit, and Recorder of Andover and Winchester, having been created Queen's Counsel, were in Trinity Term last called within the Bar.

George Boden, Esq., of the Midland Circuit, and late Recorder of Stamford, has been appointed Recorder of Derby in the room of W. H. Adams, Esq., Attorney-General at Hong-Kong; and W. T. Maunsell, Esq., also of the Midland Circuit, has been appointed Recorder of Stamford.

William Forsyth, Esq., Q.C., has been appointed Standing Counsel to the Secretary of State in Council for India, on the resignation of L. T. Wigram, Esq., Q.C.

W. A. Henry, Esq., and Frederick Brecken, Esq., have been respectively appointed Solicitor-General for the province of Nova Scotia, and Attorney-General for the Island of Prince Edward.

William Gresham, Esq., solicitor, has been elected by the Common Council of London High Bailiff of the Borough of Southwark, and Edward Lambert, Esq., solicitor, has been appointed by the Judge High Bailiff of the County Court of Southwark. Under the 9 & 10 Vict., c. 95, s. 32, the then High Bailiff of the borough of Southwark (the late William Pritchard, Esq.) held the office of High Bailiff of the Southwark County Court. This section is repealed by 22 Vict., c. 8, which enacts that the High Bailiff of the Southwark County Court shall be appointed and removed in the same manner as the High Bailiffs of other County Courts. Under the section referred to, the late Francis Smedley, Esq., High Bailiff of Westminster, held the office of High Bailiff of the Westminster County Court, but under the repealing Act these two offices are also now separated.

SCOTLAND.

Under the late ministry the office of Solicitor-General was granted to George Patten, Esq., advocate, in the room of David Mure, Esq., who had been appointed Lord-Advocate.

Mr. Moncreiff and Mr. Maitland have been reappointed to the offices of Lord-Advocate and Solicitor-General respectively, of which they were dispossessed upon the accession of Lord Derby to power.

IRELAND.

The Right Hon. Maziere Brady has been appointed Lord-Chancellor; the Right Hon. J. D. Fitzgerald, Attorney-General; and Mr. Serjeant Deasy, Solicitor-General of Ireland.

Mr. Serjeant Berwick has been appointed Judge of the Court of Bankruptcy, in the room of Mr. Macan deceased.

Mr. H. G. Hughes, Q.C., who was raised to the post of Solicitor-General in 1850, and who was appointed to the same office in 1858, has been appointed to the seat on the Exchequer Bench, vacant by the retirement of Baron Richards.

John Leahy, Esq., and Charles Barry, Esq., of the Munster bar; E. B. Lawless, Esq., and James Kernan, Esq., of the North East Circuit—have been appointed Queen's Counsel.

CALLS TO THE BAR.

Easter Term, 1859.

GRAY'S INN.—Walter David Jeremy and Charles Alexander Smyth, Esqrs.

INNER TEMPLE.—Robert Walter Daysh Stewart; Frederick Evers; Walter Kingscote Crossman; and Henry Poulin, Esqrs.

LINCOLN'S INN.—William Dundas Gardiner; Henry Smith; John Cordy Jeaffreson; Edward Aikin; Herbert Clifford Saunders, and Joshua Frey Josephson, Esqrs.

MIDDLE TEMPLE.—Bond Coxe; Albert Gordon Langley (holder of the studentship awarded by the Council of Legal Education in Trinity Term, 1858); John Clark; and James Coverdale Patten, Esqrs.

Trinity Term, 1859.

LINCOLN'S INN.—Montague Hughes Cookson (holder of the studentship of Hilary Term, 1859); Ebenezer Charles (certificate of honour, first class); the Hon. Dudley Campbell; Edward Bradford Medlycott; Michael Richard Barry; Thomas Nottidge; Alfred Smith; Edward Wingfield; William Lowndes, jun.; Thomas Chenery; Thomas Kennedy Pater; Charles Henry Chatfield; Leone Levi; George Charles Broderick; George Clifford Mayer; William Neish; John Compton Lawrance; Robert O'Byrne, jun.; Herbert Thomas Knatchbull-Hugessen, and Herbert Riversdale Mansel Jones, Esqrs.

INNER TEMPLE.—Lewis William Cave (certificate of honour); Thomas Edward West (certificate of honour); W. Bayley Marshall Lysley; Alfred William Baillie; Edwin Agar Lascelles; John Francis Collier; Henry Stewart Cunningham; John O'Brien; George Hodgson Wayte; Drury Wake; William Storey, and David Forsyth Main, Esqrs.

MIDDLE TEMPLE.—John Standish Hayley; Francis James; William Graham Furnivall; Philip Prendergast; James Daniel Robertson; James Charles Smith; Robert Greenoak; Frederick Clifford; De Castro Fisher Lyne; Edward Thomas Edmonds Besley; Joseph Francis Chance; Gainsford Bruce; and William Charles Mark Kent, Esqrs.

GRAY'S INN.—Robert Cecil Austin and Thomas Braddell, Esqrs.

Biography.*March.*

- 4th. CROSS, John, Esq., Notary and Conveyancer, aged 46.

April.

- 23rd. SEYMOUR, W. H., Esq., Solicitor, aged 59.
 25th. NOBLE, G., Esq., Solicitor, aged 60.
 29th. M'GACHEN, J., Esq., Barrister, aged 71.
 „ KING, S. L. W., Esq., Solicitor, aged 33.
 30th. GOODING, J., Esq., Solicitor, aged 63.

May.

- 2nd. MORLAND, J., Esq., Barrister, aged 62.
 13th. BOURCHIER, S., Esq., Solicitor.
 15th. KENNEDY, J., Esq., Barrister, late her Majesty's Judge in the mixed Court of Justice at Havanna, aged 60.
 23rd. GARLAND, J., Esq., Solicitor, aged 44.
 „ NICHOLS, H., Esq., Barrister, aged 43.
 26th. BOINTON, Thomas, Esq., Solicitor, aged 74.
 29th. PASHLEY, Robert, Esq., Q.C., Assistant Judge of the Middlesex Sessions, aged 54.
 29th. HOBSON, J., Esq., Solicitor, aged 59.
 31st. BAKER, M. B., Esq., Solicitor.

June.

- 3rd. COOPER, Charles, Esq., Solicitor, aged 59.
 4th. CAHILL, Francis, Esq., Barrister.
 7th. SIM, William, Esq., Solicitor, aged 47.
 9th. ATKINSON, F. R., Esq., Solicitor, aged 75.
 12th. VAUGHAN, William, Esq., Solicitor, aged 67.
 15th. MACAN, —, Esq., one of the Judges of the Dublin Court of Bankruptcy.
 17th. KNOWLES, George B., Esq., Solicitor, aged 39.
 22nd. THOMAS, H., Esq., Solicitor, aged 65.

July.

- 6th. LITLEDALE, Henry A., Esq., Barrister, aged 49.
 7th. PAGE, G. A., Esq., Solicitor, aged 65.
 11th. BURRELL, J. P., Esq., Barrister, aged 86.
 „ RAWLINSON, Thomas A., Esq., Barrister, aged 48.
 12th. GODDARD, Godfrey, Esq., Solicitor, aged 62.
 14th. ADDISON, John, Esq., Barrister, Judge of County Courts for the Fourth or North Lancashire Circuit, aged 68.

List of New Publications.

Amos—Observations on the Statutes of the Reformation Parliament in the Reign of King Henry the Eighth. By A. Amos, Esq., Barrister. 8vo, 10s. 6d. cloth.

Archbold's—Justice of the Peace and Parish Officer, with the Practice of Country Attorneys in Criminal Cases; comprising the whole of the Law respecting Commitments, Convictions, and Orders, with Forms, and a Tabular Arrangement of Offences, with their Punishments, &c. By J. F. Archbold, Esq., Barrister. Sixth Edition. Vols. I and II. 12mo, 45s. cloth.

Ayckbourn—The New Practice of the High Court of Chancery, comprising Proceedings by Bill, Claim, Special Case, Summons, and under the Charitable Funds Act, the Settled Estates Act, and the Infants' Marriage Act. Sixth Edition. By H. Ayckbourn, Solicitor. 12mo, 16s. cloth.

Ayckbourn—Forms of Practical Proceedings in the High Court of Chancery, with the Orders of Court, Rules and Regulations from Michaelmas 1849 to Easter 1859. Sixth Edition. By H. Ayckbourn, Solicitor. 12mo, 10s. cloth.

Cole—Forms of Oaths, Affirmations, Declarations, and Jurats; to which are added Forms of Recognizances of Bail in Error, &c., to be taken by Commissioners in the Country; with Explanatory Notes and Observations, and the Act 22 Vict. c. 16, for the use of Commissioners appointed under the Authority of that Act. By R. Cole, Solicitor. 12mo, 2s. cloth.

Crabb's—Complete Series of Precedents in Conveyancing, and of Common and Commercial Forms in Alphabetical Order, adapted to the present State of the Law and the Practice of Conveyancing; with Copious Prefaces, Observations, and Notes on the Several Deeds. By J. T. Christie, Esq., Barrister. The Fifth Edition, with numerous Corrections and Additions. By Leonard Shelford, Esq., Barrister. 2 vols. royal 8vo, £3 cloth.

Cust—The West India Encumbered Estates Acts, with General Rules, Forms, Local Acts, Tables of Fees, Reports of Cases, &c. By R. J. Cust, Esq., Barrister. 8vo, 6s. cloth.

Hallilay—The Articled Clerks' Hand-Book, containing a Course of Study in all the Branches of the Law, &c. ; being a complete Guide to their Examination and Admission as Attorneys, with a Glossary of Technical Law Phrases. By R. Hallilay, Solicitor. 8vo, 5s. 6d. cloth.

Hopkins—A Hand-Book of Average for the Use of Merchants, Agents, Shipowners, Masters, and others; with a Chapter on Arbitration, with Appendices of Cases. By M. Hopkins. Second Edition. 18s. cloth.

Pollock's—Practice of the County Courts, with the Decisions of the Superior Courts, and Tables of Fees; also Appendices containing all the Statutes, Rules of Practice, and Forms. In Two Parts. The Fourth Edition. By C. Pollock and H. Nicol, Esqrs., Barristers. Royal 12mo, 21s. cloth.

Selwyn's—Abridgment of the Law of *Nisi Prius*. The Twelfth Edition. By D. Power, Esq., Q. C. 2 vols. royal 8vo, £2, 16s. cloth.

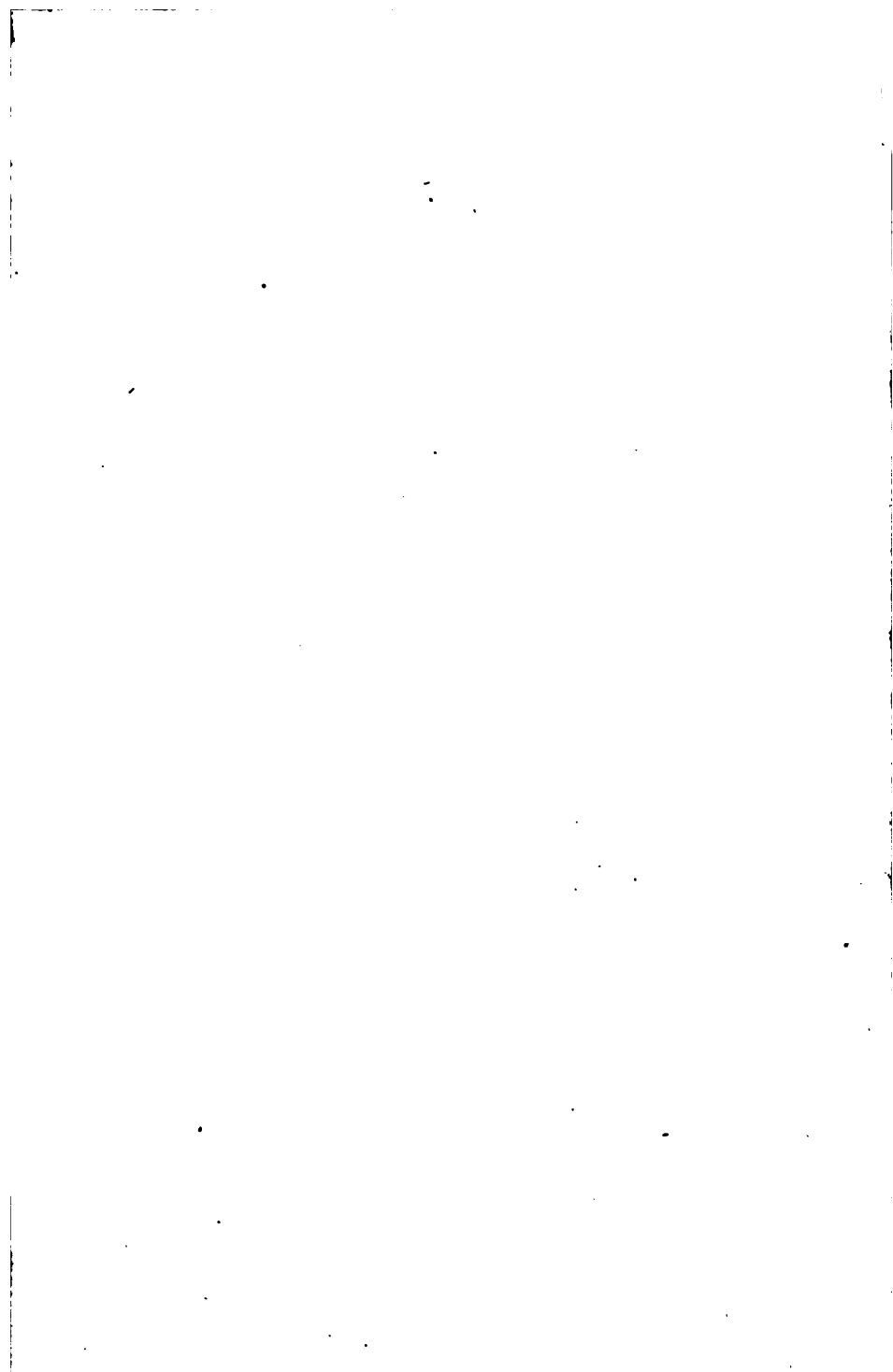
St. Leonards—A Handy Book on Property Law, in a Series of Letters. By Lord St. Leonards. Seventh Edition with Additions, and an Index. 12mo, 3s. 6d. cloth.

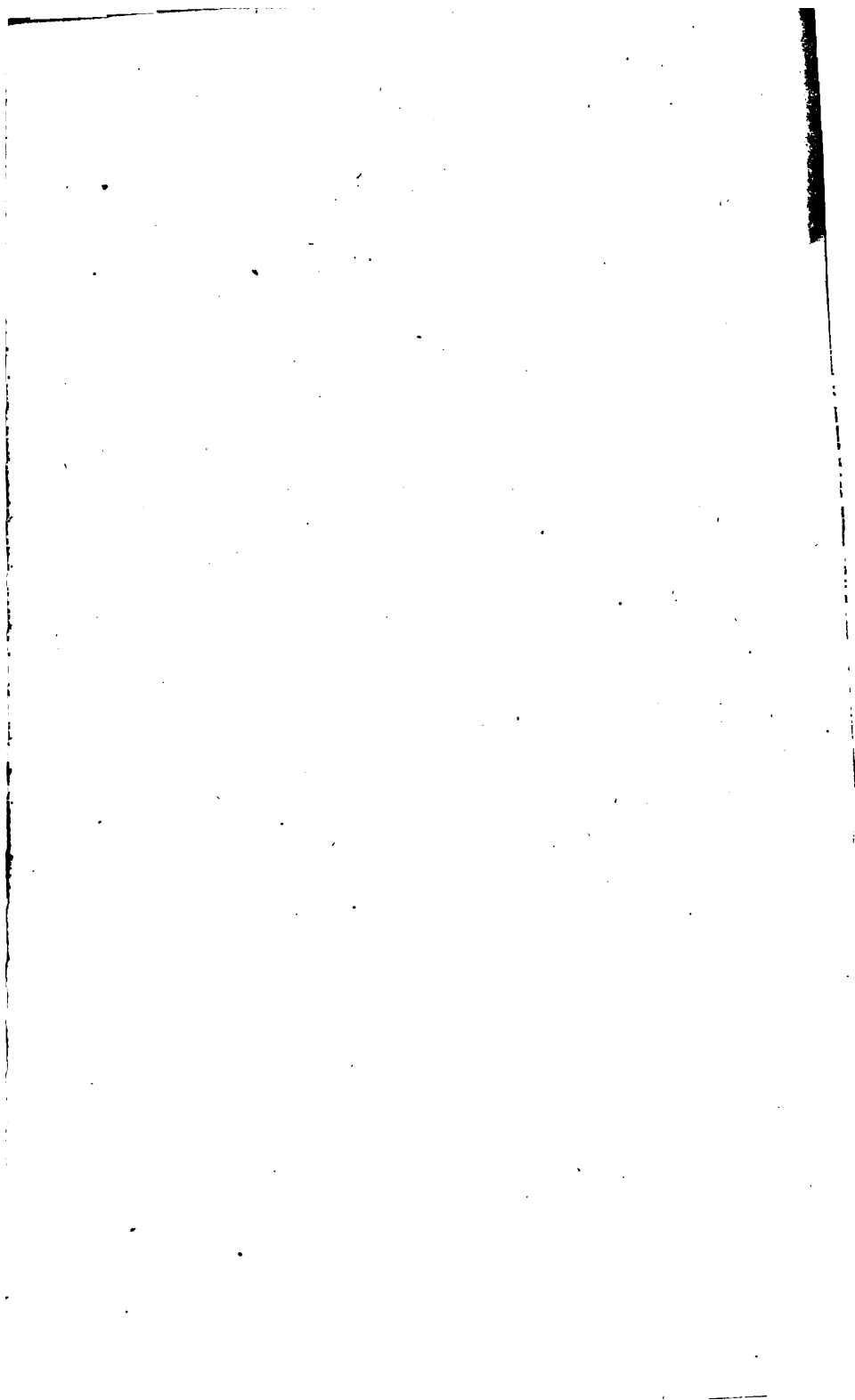
Suitors' Fund—A Letter to the Lord High Chancellor, with Reference to the Investment of the Cash Balances belonging to the Suitors of the Court of Chancery, and the Mode in which Government Securities are Purchased and Sold on the Suitors' Account. By J. W. Flower, Solicitor. 8vo, 1s. sewed.

Swabey—The Act to Amend the Law relating to Divorce and Matrimonial Causes in England, with the Amendment Acts of 1858, and an Introduction; also, Notes of Cases decided in the Court for Divorce and Matrimonial Causes, Rules, Orders, and Forms of the Court. By Dr. Swabey, D.C.L. Third Edition. 8vo, 10s. cloth.

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